TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 146

THE STATE OF TEXAS, APPELLANT,

vs.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED NOVEMBER 2, 1923.

(29,230)

(29,230)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 680.

THE STATE OF TEXAS, APPELLANT,

vs.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1922.

1 *Caption.*

Be it remembered that at a regular term of the United States District Court for the Western District of Texas, holding its session at Austin, Texas, and which term began on the — day of ——, A. D. 1922, and continued to and including the — day of ——, 1922, there came on to be heard and determined before the Honorable Duval West, Judge of said Court, Cause No. 323 in Equity, entitled, The State of Texas, plaintiff, vs. Eastern Texas Railroad Company, et al., defendants; and that this being a cause in which an appeal is taken upon an agreed statement in compliance with Equity Rule 77, the proceedings herein necessary to be considered on this appeal are as follows:

The United States District Court, Western District of Texas, Austin Division, August 11th, 1922.

In Equity.

No. 323.

STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD CO., et al.

In Equity.

No. 325.

EASTERN TEXAS RAILROAD COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF TEXAS et al.

Statement of the Case.

Showing how the questions arose and were decided in the District Court, and setting forth so much only of the facts alleged and proved as is essential to a decision of such questions by the appellate court, these matters being correctly presented in the findings and opinion of the District Judge as follows, to-wit:

In equity Suit No. 323, by the State of Texas to enjoin the Eastern Texas Railroad Company from discontinuing operation and from abandoning and dismantling its road. The Railroad Company, by Cross-action, seeks injunction against the State from interfering or preventing abandonment of service and dismantling.

In equity Suit No. 325, Eastern Texas Railroad Company sues Railroad Commission of Texas and others for injunction
2 preventing interference with its intention to permanently abandon operation and to dismantle its road.

These two cases relate to identical issues of law and fact, and are considered together.

The Eastern Texas Railroad Company called Railroad on June 3rd, 1920, applied to the Interstate Commerce Commission for authority to abandon operation, and to dismantle and remove its road. The State of Texas thereupon—July 14th, 1920, entered suit against the Railroad in a State Court to enjoin such action, and a temporary writ of injunction was issued. The case was removed to this Court by Railroad, and was here numbered 323. On December 2nd, 1920, the Interstate Commerce Commission granted the Certificate authorizing abandonment of the Railroad. The temporary injunction theretofore issued by the State Court was dissolved by his Court.

Railroad, on December 20th, 1920, brought its independent suit in Equity, numbered 325 in this Court, against the Railroad Commission of Texas and others, seeking to enjoin defendants from interfering with Railroad's right to abandon, dismantle and salvage its property as granted by the Interstate Commerce Commission; on April 29th, 1921, a temporary writ issued as prayed for and, awaiting result of appeal in number 323, no further action was taken.

The State appealed to the Supreme Court of the United States. The case was there docketed and numbered 298. That Court issued its order April 21st, 1921, suspending this Court's order dissolving injunction issued by the State Court, and required that the status quo be preserved.

The State of Texas and others, on September 10th, 1921, brought suit in the United States District Court for the Eastern District of Texas, against the United States, the Railroad, and others, to annul the Interstate Commerce Commission's order and certificate of abandonment. Railroad's motion to dismiss was granted
3 September 21st, 1921; and an appeal was taken and filed in the Supreme Court of the United States October 1st, 1921, docketed and numbered 563. The two cases appealed, numbers 298 (323) and 563, were considered together, and were both disposed of in the Court's opinion of March 13th, 1922—(42 Supreme Court Reporter, 281) each case being reversed and remanded for further proceedings; the Supreme Court holding that the Commission's Order and Certificate of Abandonment issued under authority of Sections 18, 19 and 20 of the Transportation Act of 1920 (Sec. 402, 41 Stat. 456-477, was adequate to sanction a discontinuance of Railroad's Interstate and Foreign business; that the road was entirely within a single state, owned and operated entirely by a corporation of that state, not a part of another line, its operation solely in intrastate commerce, and its abandonment or discontinuance was a question of local concern; that in these circumstances the Commission was without authority over its purely intrastate business. Whether, apart from the Commission's Certificate, the Railroad is entitled to abandon its intrastate business was not before the Court.

Conforming to this opinion Railroad, in case number 325, on April 29th, 1922, amended its Bill and no longer relied on the Commission's Certificate and Order authorizing abandonment of its railroad properties in intrastate commerce. It declared that its property would be confiscated and taken without due process if denied the right to abandon operation in intrastate commerce, and to dismantle, salvage, sell, remove and dispose of its property for the benefit of its stockholders, because contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; and also violative of the provisions of the Constitution of the State of Texas, and praying for injunction,—a temporary writ being granted on the same day.

In case numbered 323 Railroad filed its Amended Answer, Counter-Claim, and Cross-Action, May 13th, 1922, setting up in substance matters alleged in the Amended Bill in that case, and seeking relief by injunction. The Railroad Commission of Texas, and
4 others, defendants, by Supplemental Answer, took issue, May 29th, 1922; and filed a joint motion to (1) dissolve the temporary injunction theretofore therein issued, and (2) to dismiss the complainant's suit.

In case No. 323 The State of Texas asks that the Railroad be enjoined from abandoning operation and dismantling its road, and be required to continue operation. The Railroad by cross-action seeks injunction preventing interference with its right to abandon and dismantle. In No. 325 the Railroad asks that the Railroad Commission of Texas, The Attorney General of Texas, and others, by injunction be prevented from interfering with Railroad abandoning and dismantling its road.

The Railroad contends that it has the right to abandon operation of its road and to dismantle it and dispose of its physical properties by sale or otherwise to the best interest of its stockholders because it is insolvent, and the revenues derived from operation are not sufficient to meet expenses and allow a fair return upon the investment, with no reasonable future prospect of such revenues; and says that to compel it to continue operation and to prevent it from dismantling would be to take its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; and, likewise, contrary to Article 1, parg. 17, of the Bill of Rights; and Section 10 of the Constitution of the State of Texas.

The State of Texas and its Railroad Commission contend that by virtue of the Charter contract entered into with the State, and because of express provisions of its statutes, the Railroad must maintain and operate its road in any event, and that the Fourteenth Amendment is without present application; Also take issue with Railroad on the Facts.

The Interstate Commerce Commission's Certificate of Public Convenience and Necessity authorized the Railroad "to abandon the operation of all of its lines of railway now owned and op-
5 erated by it; and to take up, dismantle or remove any part or all of the property of said Company; and in any lawful manner to dispose of any or all parts of said property so taken

up, dismantled or removed, or as it is now situated." The Supreme Court, in State of Texas vs. Railroad, supra, as noted, holds that this Certificate was sufficient to "sanction a discontinuance" of Railroad's interstate and foreign business only, and the questions (1) whether the State of Texas, operating through its Railroad Commission, and by force of its statutes and the charter contract, can compel reconstruction and operation of the Road as an intrastate carrier, or (2) whether Railroad may "abandon and dismantle" as to intrastate commerce, are to be answered.

Statement of Facts.

The Interstate Commerce Commission, considering the same issues in question here, found facts—admitted by the State's Counsel to be true—as follows:

"The Eastern Texas extends from Lufkin, Texas, in a Westerly direction 30.3 miles to Kennard, Texas, and has in addition to its main line track about 4 miles of switch yard, and passing tracks. At Lufkin, its tracks connect with those of the St. Louis Southwestern Railway Company of Texas, hereinafter called the Cotton Belt, the Houston, East & West Texas Railroad, the Groveton, Lufkin & Northern Railway, The Texas Southeastern Railroad, and the Angelina & Neches River Railroad. It has no other railroad connections. It maintains a joint agency with the Cotton Belt at Lufkin, has agency stations at Ratcliff, Texas, and Kennard, and has 6 sidetracks at other points where carload freight may be received or delivered. It owns 1 combination passenger, mail and express car, but no other rolling stock. It rents 1 light locomotive from the Cotton Belt, and pays per diem under the code rules for foreign cars while on its line. The only regular service it maintains is 1 mixed freight and passenger train daily, except Sunday between Lufkin and Kennard.

"The Eastern Texas was incorporated November 8, 1900, for 25 years under the general railroad incorporation laws of Texas, to construct a railroad from Lufkin to Crockett, Texas. Its line was constructed to Kennard in 1901 and 1902, and has been continuously operated since, though it has not been extended to Crockett. The Company was promoted and financed by individuals interested in the Texas-Louisiana Lumber Company, hereinafter called the Lumber Company, which is a subsidiary of the Central Coal & Coke Company of Kansas City, Mo. A substantial amount of applicant's right-of-way was donated to it by the owners of the land. It never received a land grant from the State, nor exercised the right of eminent domain. It was originally authorized to issue
6 $150,000 capital stock, which amount was increased in 1902 to $1,000,000. Shares of stock with a par value of $454,500, but no bonds, have been issued. On September 1, 1916, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, which except for the directors' qualifying shares, still holds it. There is substantial identity between the officers of the Eastern Texas and the Southwestern.

"This line was constructed primarily to serve the Lumber Company, which then owned 116,000 acres of pine-timber land near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the South for the production of lumber and forest products. Applicant built numerous tram roads through his timber to connect with its main line. On August 28th, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value $94,604.49, to the Lumber Company. This sale was made in contemplation of the transfer of the Eastern Texas stock to the Southwestern for bonds of that Company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

"The Ratcliff mill ceased operation about 1917 and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line."

And the State, in its brief, makes the further admissions that

"The Cotton Belt Railroad, by reason of its ownership of the Eastern Texas stock has allowed fair division of freight; and has extended to the Eastern Texas Railroad Company credit; interstate traffic arising on such road has been almost completely handled by the cotton Belt; that the Cotton Belt Company is in a better position to furnish equipment, supervision, labor, supplies, and all things necessary for the operation, maintenance, and support of the Eastern Texas short line; that if the road is abandoned, the nearest railroad stations for the communities served by the Eastern Texas Railroad will be Crockett on the I. & G. N. Ry., seventeen miles from Kennard, and twenty miles from Ratcliff and Wells. Public highways in the country are not improved.

December 31st, 1919, the Railroad Commission of Texas placed a valuation on this property of $458,048.64. There are no bonds or other indebtedness of the Company. A credit of $42,228.06 on December 31st, 1917, represented earnings from January 1st, 1906. The mill at Ratcliff ceased operation in 1917. The road ceased operation April 30th, 1921. After the loss of traffic from the mill this credit was all absorbed, and up to April 30th, 1921, an added loss of $11,743.75 is shown, or a total loss since January 1st, 1918, of $53,972.01. The loss sustained under Government operation
7 for 26 months was $85,544.98, making a total loss up to April 30th, 1921, of $140,516.99. The Road has no cash or credit. What its physical property may bring at sale as salvage is its only asset: That is estimated to be about $50,000.00, less the cost of dismantling. Though widely advertised and offered for sale at that figure no bids were received.

Heavy expenditures on roadway and trestles will be necessary before operation can, with safety, be resumed. Two engineers—not in Railroad's employ—testified in June, 1922, that $250,000.00 would be required,—the Engineer for the State Railroad Commission, on January 17th, 1921, reported that $120,000.00 would be sufficient.

In July, 1920, the Interstate Commerce Commission's Engineer estimated the amount at $146,726.00. I find that on May 1st, 1921, when operation ceased, that a conservative and fair estimate would be $165,000.00, with an added expenditure of $20,000.00 before June 1st, 1922, a total of $185,000.00 to that date.

Result of Operation.

The income statements, and in fact all of the tabulated data covering income from operation, the expenses, and so forth, made by the Company, and like data during the period of Federal Control, and statements of tonnage, and of ratios of revenues and expenses, State and Interstate, from 1910 down to 1921, cover data filed by the Company, as required by law, with the Railroad Commission of Texas and the Interstate Commerce Commission. These figures are not questioned and are taken as correct.

The operating expenses from 1906 to 1917 averaged $52,577.63 per annum. The average operating revenue, per year, during the period was $66,711.38. There was no loss in operation for any year during that period except $41,012.28 in 1908, and $1,798.38 in 1909. Trestles were being rebuilt during those years. Operating costs from 1918 to April 1921 show heavy deficiencies—the year 1918, $20,128.46; 1919 $49,362.64; January and February,
8 1920, $17,053.88; and from March 1st to December 31st, 1920, $51,157.80; January 1st, 1921, to April 30th, 1921, there was a loss of $12,177.02.

During the year the mill ceased working—1917—all reserves of manufactured forest products on hand were passed over the road; also the dismantled mill, machinery and equipment moved over the road. This accounting for a heavy tonnage after the mill ceased operating.

Mr. Green, the Vice President of the Railroad, basing future costs upon costs of operation shown in June, 1922, estimates the future total cost of operation as $100,713.55 per annum,—as itemized the figures are:

"Cost per month of operating mised trains	$1,664.23
" " " " " Section and other maintenance of way items	2,592.69
Cost per month of operating stations	444.63
Total	$4,701.55
Total cost per annum	$56,418.56

"The above item, cost of operating mixed train, $1,664.23, only includes the wages of the train and engine men, and the fuel.

"To the total cost per annum, $56,418.56, must be added, on the basis of business done in 1920, the hire of equipment, $8,350.17 per annum; taxes on 1920 basis, $3,952.41; joint facilities rents, $120.00; maintenance of equipment, $5,092.37; 500 ties per annum would

have to be renewed at a cost of $1.25 each in the track, which for the thirty miles would be a charge of $18,750.00 additional. This makes a total cost of operation of $92,683.51. The above items, however, do not include the entire cost of operation, but when all of the items are figured in it was the opinion of Colonel Green that the total cost of operation would be $100,713.55."

This represents an increased cost for future operation over that of past operation up to 1917 of nearly 98%. The State claims that this is due to inefficiency and uneconomic management. The Railroad claims that increased cost of labor and material during the War period and subsequent thereto is responsible. The future average cost of operation per year will exceed by 60% the average per annum cost of operation for the first seventeen years, being
9 approximately $84,000.00. Future average annual estimated revenues from intrastate business is $20,000.00. The showing is a probable annual deficit for the future of $64,000.00.

The road was originally built to develop the 116,000 acres of pinelands owned and controlled by the Texas & Louisiana Lumber Company. From 1910 to 1921 eighty per cent of the traffic was lumber and forest products, practically all moving interstate from Ratcliff. From 1910 to 1917, inclusive, the average of interstate tonnage was 73 per cent, and 27 per cent intrastate; during the same period the average of revenues for interstate tonnage was 66 per cent; and 34 per cent intrastate. In 1920, 86 per cent of tonnage was intrastate, and 14 per cent interstate. In 1921, 91 per cent intrastate, and 9 per cent interstate. The same relative proportions obtained as to revenue.

A deficit from March 1st, to December, 1920, of $51,157.80 indicates that intrastate traffic alone is insufficient to pay the cost of operating the road. The four months ending April 30th, 1921, show a deficit of $12,177.02.

As to future tonnage from products of the forest, State witnesses Gibson and Denton estimate that 230,000,000 feet of lumber are available when cut and milled into lumber for shipment, or approximately 46,000 car loads. Railroad's witnesses Irving, on direct, and Berry and Meford, in rebuttal, qualified as men of special experience and of knowledge of the territory for a great many years. They are positive that all available tie timber had been cut by the Lumber Company, and the only other merchantable timber they found was in isolated, small tracts, held by the individual owners, and a few tracts on the lands of the Texas & Louisiana Lumber Company. The evidence further shows that the Mill at Ratcliff at that time had been moved from this territory for lack of available raw material.

What of future agricultural developments? The testimony
10 is conflicting. It is apparent, however, that the agricultural lands are confined to the low lands lying along the streams in that territory. The evidence shows that the cut-over pine lands are of the sandy and por-us soil. Experiments in agriculture by those interested in the development of their lands have been unsuccessful. This portion of Texas was the first settled in the early years of the

Republic,—more than eighty years ago. Agriculture there has never been a success. Large acreages representing cut-over lands are held by their owners in solido, practically none being offered for sale. Practically no corn has ever been shipped out over the road. The highest movement of cotton in any one year—1914—was more than 6,000 bales. Since then there has been a marked decrease: The average annual movement from 1910 to April 30th, 1921, was 2,200 bales. Revenue from cotton averaged $1.00 per bale.

In December, 1920, the Interstate Commerce Commission decided the same questions of fact that are before this Court, on practically the same evidence and conditions, as late in point of time as 1920. The Commission found by its order and Certificate of Public Convenience and Necessity that the railroad should be abandoned. This conclusion was reached having in view the earnings and future prospects of the road, both as to state and interstate carriage. The evidence of conditions and occurrences since the Commission hearing down to cessation of operation—April 30th, 1921—and as late as June, 1922, fully confirm the Commission's judgment.

The Railroad being no longer required to continue as an interstate carrier must rely for future revenue solely on its intrastate business. Its value in 1919, so found by the State Railroad Commission, of $458,048.64 had shrunk to a probable value as junk of $50,000.00 in 1921. Its total loss from twenty years' operation to April 30th, 1921—the date of cessation—was approximately $145,000.00. Expenditures on deferred maintenance and replacements necessary to put the road in safe and efficient condition for
11 future operation is fairly estimated at $185,000.00. Future averages annual cost of operation would be approximately $84,000.00; future average annual revenue from intrastate business would be around about $20,000.00; the annual deficit $64,000.00. The Charter expires November, 1st, 1925. The Company is without money or credit, or means to resume or continue operation during the lifetime of its Charter. These figures force the inevitable conclusion that the Railroad Company has reached the ultimate limits of any possible future activity, either physical or financial. It lies inert—practically bankrupt. In view of these facts can the State compel resumption and continuance of operation of the Railroad?—and prevent dismantling and salvage?

Law of the Case.

The Articles of Incorporation were filed October 27th, 1900, and conformed to the provisions of the general law. The object stated was for the purpose of "constructing, owning, maintaining and operating" a railroad. The eight Articles give (1) the name of the corporation; (2) the names of towns designated as termini; (3) the situs of its principal place of business; (4) the term of the Charter as 25 years from November 1st, 1900; (5) the amount of its capital stock; (6) the names of incorporators; (7) the names of its directors and officers; and (8) the number of shares of stock and the par value of each. Thus far there existed only "permission" from the State

and an "intention" on the part of the Company. The grant of Charter rights and powers became fixed upon the construction of the railroad, and remained so during its continued maintenance and operation. The powers granted, the opportunity afforded to realize a reasonable profit on the one side, and the dedication of the company's properties limited to use as a public highway for twenty-five years, were valuable considerations moving between the par-
12 ties. Thus inchoate rights became vested. The Charter powers granted and the laws governing the status thus created, and the mutual rights, obligations and duties imposed, constituted a contract, so recognized since the Dartmouth College case, (4 Wheat. 518) and as such protected by the Constitution of the United States.

Opinion of the Court.

The State bases its right to require continued operation and prevent dismantling (1) upon breach of the Contract, and (2) upon express statutory requirement.

The Contract.

The contract does not prohibit, in so many words, the removal of the railroad track, but the obligation assumed by the Company to maintain and operate the road for twenty-five years, between certain designated points, are inconsistent with the right to remove. So long as the public uses the highway it must be maintained at the location designated. The Company must continue operation unless some contingency arises vitally affecting performance. It dedicates certain of its real and personal properties to a particular public use—a public highway. No right, title or interest in this property passes to the State or to the Public except the right of the public to use the property as a highway—a common carrier. As said in the Dartmouth College case, supra, "the property was private property * * *. Their (the trustees') right to hold the Charter, administer the funds, and visit and govern the College was a franchise solemnly granted them. The use being public in no way diminishes their legal estate in the property, or their title to the franchise." As in that case the Railroad retains physical possession and legal title to its properties, charged with the burden of their employment to the public use during the existence of the contract. In no other way is its legal estate diminished or burdened. The business of the Railroad as common carrier must be conducted subject to the restrictions, regulations and duties imposed by law. The state retains, in the interest of the public, the
13 right to fix and to regulate the rates of carrying charges which the public must pay. From the standpoint of the railroad its ultimate object is to realize profit. The State's chief concern is to provide a highway of commerce for the public. The two ends can only be reached by the continuous use of the property during the term of the contract. It is the gist of the whole case.

The Railroad's revenues are not sufficient either to pay current expenses, or a fair return on the investment. To compel operation would be to take its property without due process. This condition arises because the public fails to use the highway,—that is to say, the revenues derived from that use are insufficient to produce the net returns allowed by the law. The contract does not in terms provide or guarantee that the use made will be sufficient to do this. It may be that neither party has breached the contract, but the failure to use causes failure of revenue, and failure of consideration, and stops the continuous use of the highway. The public's failure to use is, therefore, the prime cause of the controversy. That revenues are inadequate and that property may be taken without due process follow the cause as inevitable effect.

The case of the State of Texas vs. Travis County (1893-85 Tex. 435), a decision by the Supreme Court of Texas, is authority for some of the propositions referred to. The Republic, later State of Texas, in 1839 dedicated a certain block of ground in Austin, Texas, to be used for the public purpose of a "Court House" and "Jail." The buildings were erected and were used for the purpose dedicated, by the County, until 1876. The Court House and Jail were then abandoned and new buildings for those purposes were erected at another location and occupied and used by the County ever since. The County, asserting title, brought suit against tenants for rentals due under lease contract. The State, through its Attorney General, intervened in trespass to try title. The lower courts found against the State which took its writ of error to the Supreme Court. The only issue was one of title. The Court holds
14 that the facts "show a dedication of the use of the block to the County * * * so long as the County might elect to occupy it for such purposes. The fee never passed out of the State." In the instant case the public secured the right to use the railroad highway, but the Company's legal title never passed. Speaking to the doctrine contended for by appellee to the effect "that by the dedication public rights were acquired in the use of the land which could not be impaired or destroyed by the action of either the County or State," the Court declines to give it general application in the case before it, and holds that the dedication must be unqualified and clearly intended for general public uses, but "instead of being general or unqualified * * * the privilege granted was to use the land for a Court House and "Jail." Therefore, the use by the public of Railroad's property, being for a limited and qualified purpose—that is to say a "highway," the principle that the public had acquired rights which could not be impaired or destroyed, as asserted by the State in the present case, has no application. The Court further says, p. 441, "The State had pledged the land only for specified uses, and when they were abandoned, there rested upon it no obligation to devote the property to purposes never consented to by it, by dedication nor otherwise, in favor of either the County, or purchasers of lots." The Court cites in support of this proposition "Lewis on Em. Dom. Sec. 596; Washb. on Ease., 707; Ang. on Highways, Sec. 326; 5 Am. & Eng. Encyco. of Law,

419; 55 Pa. St., 350; 44 Ohio St., 406; 36 Barb, 136; 52 Conn., 256." The failure of the public to use the dedicated highway to such an extent as to afford fair compensation amounts practically to an abandonment. Being so, the dedicated use fails,—the Railroad ceases to be a public highway.

The Supreme Court of the United States has decided that the public cannot compel a railroad to run at a loss; that apart from Statute or express contract people who have put their money
15 into a railroad are not bound to go on with it at a loss, if there is no reasonable prospect of profitable operation in the future; that since the public may or may not use the highway, and the State retains the right to fix the compensation by regulating rates, the railroad is entitled to earn its expenses and a fair return upon its investment; that to deny such earnings and to compel performance of this duty would be to take its private property without due process of law contrary to the Fourteenth Amendment to the Constitution which provides that no State shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. (Commission cases 116 U. S., 307; C. M. & St. P. Ry. Co. vs. Minnesota, 134 U. S. 418; Budd vs. New York, 143 U. S., 517; Reagan vs. Farmers L. & T. Co., 154 U. S., 362; Smyth vs. Ames, 169 U. S., 464; Northern Pacific R. R. Co., vs. North Dakota, 236 U. S., 585; Brooks-Scanlon Company vs. Railroad Commission of La., 251 U. S. 376; Bullock, et al., vs. Florida, et al., 254 U. S., 513). In point of fact the State is not seriously maintaining the contrary to principles declared by these opinions.

That a Railroad having granted the public an interest in its use, it may withdraw its grant by discontinuing the use when that use can only be kept up at a loss. (Munn vs. Illinois, 94 U. S., 113; Brooks-Scanlon Company vs. Railroad Commission, supra.) Giving effect to this principle is to declare that notwithstanding the obligation of the Charter contract to construct, maintain, and operate the road as a common carrier between designated points for twenty-five years, the Railroad had the right to withdraw its property from use by the public unless adequately compensated, because in violation of the Fourteenth Amendment; That is to say, the amendment controls notwithstanding the obligation of the Charter contract. The law reads into the contract a proviso which says "the railroad may terminate this contract, and withdraw its prop-
16 erty from public use unless compensated, or there is a reasonable future prospect thereof. The State has directed attention to no particular provision of the contract which requires continued operation and maintenance and prohibits removal in any event—the Court finds none and so holds. The contract fails to define the rights of the parties upon its termination. If the withdrawal from public use be permanent, as in this case, that constitutes recision, or abandonment. The contract terminates. The property reverts to its owner, freed of any claim of right in the State, or the public—unless such a right is created by Statute.

The Statute.

To maintain its position the State also relies on Title 115, Articles 6676 and 6625 of the Revised Statutes (1911) of the State of Texas, and the provision in the Constitution of Texas,—Article 10, Section 2, declaring Railroads to be highways.

Article 6676 requires that a railroad shall continue operation from day to day—the charter contract substantially covers this requirement. No authority is presented why this Article stands in the way of the application of the Fourteenth Amendment under the facts in this case. This Article and practically all of the regulatory enactments are effective only uring the existence of the contract: That is to say, while the public is making use of the Company's facilities to such an extent as will enable it to operate from day to day. The State does not maintain that "day to day operation" is required after the contract is terminated by failure of consideration, and consequent necessary and enforced lawful abandonment. Nor does the State contend that the Article affords justification for burdening the properties with a use which is and can no longer be lawfully exercised by the public.

The Constitutional designation that all railroads of the State are highways can only have reference to railroads that are going concerns. A highway is no longer a highway when the public
17 ceases to use it. The State's right to take private property under conditions that violate the fundamental paramount law must be founded upon something more substantial than mere declaration.

Article 6625, and interpretation given it by the Texas Courts are the main stays of the State's contentions. This Article became effective March 29th, 1889, prior to the grant of the Charter—1900. A copy follows:

Caption, "Railroads."

"Sec. 1.—As to rights of purchasers of roadbeds, etc., sold for debt.

"Sec. 2.—Jurisdiction over companies availing of the provisions of this law.

"Sec. 3.—Emergency clause.

"Section 1. Be it enacted by the Legislature of the State of Texas: That Chaper 11, Title 84, of the Revised Civil Statutes of the State of Texas, be amended by adding thereto the following article:

"Article 426*a*. That in case of any such sale heretofore or hereafter made of the roadbed, track, franchise or chartered right of a railway company or any part thereof, as mentioned in Article 4260 above, the purchaser or purchasers thereof and their associates shall be entitled to form a corporation under chapter one of this title, for the purpose of acquiring, owing, maintaining and operating the portion of the road so purchased as if such road or portion of the road were the road intended to be constructed by the corporation, and

when such charter has been filed the said new corporation shall have all the powers and privileges conferred by the laws of this State upon chartered railroads, including the power to construct and extend; Provided, that notwithstanding such incorporation the portion of the road so purchased shall be subject to the same liabilities, claims, and demands in the hands of the new corporation as in the hands of the purchaser or purchasers of the sold out corporation; Provided, that by such purchase and organization no rights shall be acquired under any former charter or law in conflict with the provisions of the present Constitution in any respect, nor shall the main track of any railroad once constructed be abandoned or removed.

"Section 2. No Railway Company availing itself of any of the privileges herein provided shall claim to be under the jurisdiction of the Federal Courts by reason thereof; and any railway company which may avail itself of the said privileges which shall claim to be subject to the jurisdiction of the Federal Courts in pursuance of this article shall ipso facto forfeit its re-organization and be remanded to the same condition as it was prior to said reorganization.

"Section 3. Whereas there is in existence no law which sufficiently provides the manner in which a railroad company sold out under decree of the court or otherwise may form a corporation for the purpose of acquiring, owning and extending such sold out property, and the lateness of the session, create an emergency an imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days, and that this
18 act shall take effect and be in force from and after its passage, therefore it is so enacted."

This Act is supplementary to Article 4620, which provided that where a railroad and its franchises were sold, the purchaser took the property and charter rights, and had a right to operate the road.

Article 4260*a* was amended by the Act of September 1st, 1910, but the material provisions were unchanged. Article 4260*a* was made a part of Title 84, Rev. Stat. Texas of 1879. 593—Subject "Railroads", divided into 13 Chapters, each with [illegible]ding sub-titles. Chapter Eleven, p. 612, sub-titled "Collection of Debts from Railroad Corporations" included this Article along with others, each given sub-title. Article 4260*a* was carried into Rev. Stat. Texas of 1895, Title 94, p. 874, same subject, same chapter, and incorporated as Article 4550; and as amended September, 1910, was carried into Rev. Stat. Tex. of 1911, Title 115, "Railroads," p. 1374, same chapter eleven, same sub-title, Article re-numbered as 6625, sub-titled "New Corporations in case of sale may be formed, how". The general subject title 115 "Railroads" contains 19 chapters and 348 articles. Brefing the chronology of the Article shows Rev. Stat. 1879 incorporated in 1889 as Article 4260*a*, incorporated into Revised Statutes 1895 as Article 4550, and incorporated into Rev. Stat. 1911 as Article 6625. This Article was considered by the Supreme Court of Texas in State vs. Enid R. R., (108 Tex., 239) a case relied on by the State as authority prohibiting dismantling.

The Act prohibiting the abandonment or removal of the main track of any railroad was not intended to be general in character. This prohibition is clearly intended to be limited only in cases where a railroad has been sold out under foreclosure. The Legislature had in mind the purpose to require the purchasers of "sold out" railroads to continue to maintain and operate them by
19 preventing abandonment or removal of main tracks. The word "any" would infer a purpose to make the prohibition affect all railroads. The caption of the Act and its emergency clause evidence a contrary intention. The accepted rules of construction and interpretation of statutes would give this Act application only in those instances where the railroads were sold and new corporations were to succeed the old.

The Constitution of the State of Texas provides—Article III, Section 30,—"No bill shall be amended so as to change its original purpose," and in Section 35 "No Bill (except general appropriation bills) sall contain more than one subject which shall be expressed in the title. But if any subject shall be embraced in an Act, which shall not be so expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed." Some of the objects of these sections are; to prevent embracing in an Act, having a single purpose, irrelevant provisions having other and different objects, thus to conceal and disguise the real purpose under a misleading and deceptive title; to prevent bringing together into one Bill diverse subjects to secure support of advocates of all, neither of which could succeed on its own merits; to remedy the practice by which, through cunning management, clauses are inserted in Bills of which the title gave no intimation, thereby securing passage of bills, members being misled and unaware of their real scope and effect,—in modern vernacular, putting in the "joker". These sections, in point of fact, are given a liberal construction and in line with an elementary canon of statutory construction, that the subject of an Act must conform to and be germane to its purpose.

The very first words in the Act refer to the Article 4260 which it supplements, and its subject—the sale of a road and its properties. In the revision of the laws, 1895, it was made a part of Chapter Eleven, and given its subtitle "New Corporations, in case of sale", retaining its same title and place in the revision of 1911. If
20 the subject and the purpose of this Act was to declare a rule of law that all railroads in the State could no longer be abandoned or removed, it could find no proper place under a title that had to do with the formation of new railroad corporations "in case of sale". One or two of the chapter headings under the title 115 "Railroads" would indicate where a law of general effect should be placed; for instance, under head of Chapter 10, which is subtitled "Restrictions upon the duties and liabilities of Railroad Companies"; or Chapter 19 headed "General Provisions". It seems therefore that to give the prohibitory words a wide and general meaning would be to say that the subject of the Act has a double significance contrary to the plain requirements of the Constitution, and not germane to its title. Article 4260*a* has been the subject of comment and interpretation. The first appears in an opinion by District

Judge Key in the case of Texas vs. East Line & Red River Railroad Company, rendered February 8th, 1891. (English Railroad cases, vol. 48, p. 660). That was a case where a railroad charter was forefeited and the property placed in the hands of a receiver. The Court, referring to this Article of the Statute, says: "The Act of March 28th, 1889, now Article 6625, providing for the sale of a railroad and authorizing the purchaser to incorporate, declares 'nor shall *be* main track of any railroad, once constructed and operated, be abondoned or removed'. Whether this statute can be invoked against any one not a purchased at such sale as referred to in the Act, may not be clear".

In Wexler vs. the State (241 S. W., p. 234) The Galveston Texas, Court of Civil Appeals, April 13th, 1922, in a case where an interurban railroad had been "sold out", interpreting the Article in question, then bearing its new number 6625, the Court in effect holds that the primary purpose of the Legislature was to provide a means by which the purchaser of a railroad organized under title 115 of the statute, and which had been sold under a foreclosure decree, could obtain a new charter for the operation of such railroad.

21 In Enid Railroad vs. State—Court of Civil Appeals, December 1915—(181 Southwestern) it is held that "Article 6625 in reference to 'new corporations in case of sale,' provides for the formation of a new corporation for the purpose of acquiring, owning, maintaining and operating "sold out" railroads,"—then follows an excerpt from the prohibition as to abandonment. The Court states that this prohibition is declarative of the common law, and that the Article is important only as declaring a general policy of the State in case of a "sold out" railroad. The emergency clause, Sec. 3 of the Act, Art. 4260*a*, definitely declares that the emergency existed because "there is no law which sufficiently provides a manner in which a sold out company under decree of a court, or otherwise, may form a corporation for the purpose of acquiring, owning, and extending such sold out property." Considering the constitutional provisions, and the rule of statutory construction that the subject of the Act must conform to and be germane to its purpose, the Court, having also in mind the presumption that a law is constitutional, and giving a liberal construction to the statute, holds that the prohibitory provision against abandonment or removal by a railroad company applies only to the case of a "sold out" corporation.

The Enid Case Dictum.

The State's contention as to the general effect of the Article is based wholly on the decision of the Supr-me Court of the State of Texas in the case of Texas vs. the Enid O. & W. R. R., (108 Tex., 239). That was a case where a railrad company had been constructed and operated, later abandoned, a receiver appointed, the property sold, and the purchasers forbidden to remove the tracks. The gist of the Court's decision is contained in the following excerpt from opinion: (p. 245.)

"When the old company accepted the charter they impliedly consented to be bound by the provision of law to the effect that
22 they would not move it. When plaintiffs in error purchased the road and its franchises they became likewise obligated. We think they are bound by contract and by statute law not to move any portion of the main track, and that since they are attempting to do so they should be enjoined to desist therefrom. By the terms of Art. 6625, Vernon's Sayles' Civil Statutes, it is provided, in substance, that the 'main track' of any railroad, once constructed and operated, shall not be abandoned or moved.' We think the defendants in error should not be permitted to take up the rails and ties in violation of said statute."

This case had come from the Court of Civil Appeals by way of Writ of Error, that Court holding that the track could be removed, and the road abandoned as such. (Enid O. & W. R. R. vs. State, 181 S. W., 498.) The Supreme Court in its opinion did not refer to the rights which the Enid railroad might have under the provisions of the Constitution of the United States. The facts in the Enid case show the railroad in that case to have been a "sold out," railroad, and therefore was a case to which the terms of Art. 6625 had special application. The Court did not intend to give the article any broader scope than the facts in the particular case warranted. The Enid case is not authority sustaining the State's position that the Article has general application. The Railroad is not being "sold out" in this case, or purchased under the provisions of the Article. The Court referred to no other statute when it stated that the defendants were bound by the statute law not to abandon or move the main track. It may not be relied upon as a decision of the highest court of the State upon a question of local law, and thus binding upon the National Courts, because the effect of the decision must be limited to the facts and the law of that particular case. If the decision intends to extend the prohibition against abandonment or removal of any railroad, without limitation, thus giving it general effect, the holding would be unnecessary to the decision of that particular case and consequently dictum, and not an authority upon that point.

Unless definitely and unmistakably fixed by Statute, or by the terms of the contract itself, the State could not arbitrarily prevent the sale by the carrier of any of its property where it was
23 no longer reasonably probable that the State, or the public, would use it for the purpose for which it was dedicated under the terms of the charter.

As previously stated the only right, title and interest which the State has in the property is the right to use it in the interest of the public. If circumstances occur which render it incapable of being so used then the State and the public cease longer to have any further interest therein. To lay hands on the property under these circumstances to prevent its dismantling or removal by its owners, after abandonment, would effectually operate as a taking without due process of law.

The extent to which Federal Courts are bound by the interpretation of state statutes by State Courts is shown in cases where conflicts arise with the National Contitution, and where rights accrued before adverse construction by the State Courts. The Enid case is in conflict with the Constitution. In Missouri Pacific Railway vs. Nebraska (164 U. S., 403) the court says: "The taking by a state of the private property of one person or corporation, without the owner's consent, is not due process of law * * *," violative of the Fourteenth Amendment, Railroad was chartered in November 1900,—the Enid Case was decided February 7, 1917.

Federal Courts are not bound to follow the decision of the State Court, where rights have accrued under decisions or for lack of decisions of the state tribunals. The Federal Courts having co-ordinate jurisdiction may adopt their own interpretation of the laws although the State Courts may stand on a different interpretation after rights have accrued: (Burgess vs. Seligman, 107 U. S., 20; Kuhn vs. Fairmount Coal Co., 215 U. S., 349).

What has been said concerning Article 6625, and as to whether it should be given general or special application, and as to the effect of the decision in the Enid case forces the conclusion that
24 the article should not be given general but special and limited application: Further, that the decision of the Supreme Court in the Enid case, for the reasons stated and the facts found to exist, is not authority binding upon the Federal tribunals, or upon the Eastern Texas Railroad.

Abandonment.

The cases authorizing railroads to suspend or abandon operation under given circumstances are legion. Some of them have been referred to. The leading case upon the question as to whether or not a railroad may permanently discontinue its functions as a common carrier, or may wholly abandon its services to the public, dismantle, sell and salvage its property, is the case of Jack vs. Williams (113 Fed., 823) decided by Judge Simonton of the District of South Carolina, on February 1st, 1902. The facts found by the Court, as to ultimate conclusions, are the same as in this case. It appeared in that case that to compel the railroad's operation at a certain loss, or to keep it intact, unused, would be to deprive its owners of their property without compensation. Accordingly the Receiver was ordered to dismantle the road, and sell the material. As a presentment and discussion of all the then cases bearing on the issues in this case, and as the decision of a learned and eminent Jurist, the entire opinion ought perhaps to be embodied here. The case is authority for the abandonment of a railroad and the dismantling and sale of its properties. The Court cites it as such,—also as cumulative authority upon some of the other vital issues in this case. The reasoning of the Court is identical with the reasoning employed by the Supreme Court of the United States in the cases cited, supra, wherein the principle is maintained that a railroad could not be required to "operate at a loss. If one's property is taken without

due process in the instance of loss from operation, it is equally so taken in the instance where the effort is to restrain an owner from dismantling an abandoned property no longer being used
25 nor capable of being used in the public service. In estimating the value of this case as authority it is noted that the Court's finding was affirmed by the Circuit Court of Appeals, (145 Fed. Rep., p. 281). The Court of Appeals refers to the obligation imposed upon the owners of a railroad to maintain it as a highway, but in view of the facts in that case in affirming the action of the lower court, stated:

"The opinion of the late Judge Simonton in the Court below carefully recites all the facts connected with the attempts to operate the road, he having appointed the first receiver and being familiar with its history, and it seems to us unnecessary to further add to his convincing statement of the ground upon which the cross bill was dismissed."

Jack vs. Williams has been cited with approval in other cases where the same principles of law are maintained—that a railroad could be abandoned and disposed of to the best interest of a mortgagee by sale, (New York Trust Co. vs. Portsmouth & Exeter Ry., 192 Fed., 728). State vs. Old Colony Trust Company, 215 Fed., 307,—C. C. A.,—; Gilchrist vs. Waycross Ry., 246 Fed., 952; and a number of decisions to the same effect from the appellate courts of the various states.)

In this case certain individual defendants are joining the State of Texas, and its Railroad Commission, in the effort to require continued operation and to prevent dismantling or removal of the railroad. Their rights as parties appear to rest upon their general status as residents and members of the community, or country, theretofore served by the Railroad. Where private property is dedicated to the public, and the use limited to a particular purpose by the terms of the charter contract all having an interest in the matter are charged with notice that the abandonment of a particular use by the public would terminate the charter contract and authorize withdrawal of the private property from the particular use, thus destroying any right the public may have had in the property.
26 Whatever interest others had in the use of the property was acquired with the knowledge of, and subject to, the contingency which has arisen in this case, (Texas vs. Travis County, 85 Tex., 441, supra; Jack vs. Williams, 113 Fed., 823, supra; the same case on appeal, 145 Fed., 281, supra; Central Bank & Trust Corporation vs. Cleveland 252 Fed., 530.

From the foregoing it results that the State of Texas in the suit numbered 323 should take nothing; and that the injunction issued by the State Court should be dissolved; and, further, that the defendant, The Railroad, should be authorized to abandon its railway as to intrastate as well as interstate traffic; and also to remove its ties, rails and track, and dismantle all of its structures and property, and to dispose of them by sale or otherwise as it may be advised. It also results that the Eastern Texas Railroad Company, plaintiff in

number 325, is entitled to have the temporary restraining order, heretofore issued in this cause, against all of the defendants, made perpetual. Final orders and decrees carrying into effect the conclusions of the court, as herein expressed will be entered in due course.

Done at Austin, Texas, on August 11th, A. D. 1922.

(Signed) DU VAL WEST,
U. S. District Judge.

27 In the United States District Court for the Western District of Texas, Austin Division.

In Equity.

No. 323.

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY et al., Defendants.

Stipulation as to Record on Appeal.

It is hereby agreed by and between the parties to the above entitled cause, under the provisions of Equity Rule 77, that the questions presented by this appeal can be determined by the appellate court without an examination of all the pleadings and evidence, and that the foregoing statement of the case shows how the questions arose and were decided in the District Court, and sets forth so much only of the facts alleged and proved or sought to be proved as is essential to a decision of such questions by the appellate court. It is further stipulated and agreed that the foregoing shall constitute the record on appeal in the above entitled cause and need not be certified by the Clerk of the District Court except as an agreed record.

W. A. KEELING,
Attorney General of Texas;
WALACE HAWKINS,
Asst. Atty. General;
I. D. FAIRCHILDS,
Solicitor- for Plaintiffs.
E. B. PERKINS,
E. J. MANTOOTH,
DANIEL UPTHEGROVE,
W. B. HAMILTON,
Solicitors for Defendants.

28 In the United States District Court for the Western District of Texas, Austin Division.

In Equity.

No. 323.

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY et al., Defendants.

Order as to Agreed Record on Appeal.

In the above entitled cause, all parties agreeing thereto, it is ordered that the record annexed to the foregoing agreement of counsel as to the record on appeal shall constitute the record on appeal and that the clerk shall certify it as an appeal record without examining it and without charge except such as may be lawfully made for the certificate itself.

DU VAL WEST,
Judge.

29 *Final Decree.*

The United States District Court, Western District of Texas, Austin Division.

In Equity.

No. 323.

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY et al., Defendants.

This cause came on for final hearing on this the 11th day of August, 1922, in open court, upon the merits and upon the mandate of the Supreme Court of the United States reversing and remanding the decree of this Court dated March 17th, 1921, for further proceedings conforming to the opinion of that Court delivered March 13th, 1922; and having read the pleadings, and heard the evidence, and argument of counsel, and after due consideration thereof:

It is ordered, adjudged and decreed:

First. That the injunction heretofore issued in this cause by the Honorable George Calhoun on the 9th day of July, 1920, be and the same is hereby dissolved, set aside and held for naught;

Second. That the plaintiff's cause of action be and the same is hereby dismissed, and that the defendants the Eastern Texas Rail-

road Company, J. M. Herbert, F. W. Green, E. B. Perkins, Daniel Upthegrove, and E. J. Mantooth, recover of the plaintiff, the State of Texas, all costs in this behalf expended.

Third. That the defendant, the Eastern Texas Railroad Company have and recover judgment against the State of Texas on its Cross-action; and that the said Eastern Texas Railroad Company be, and it is hereby, authorized and empowered to abandon the operation of its line of railroad as to intra-state traffic and interstate traffic, both freight and passenger, and take up and remove the tracks therefrom, and to dismantle and remove all the structures on its rights of way and to dispose of the salvage of both the tracks
30 and the structures on the rights of way to the best interest of its stock-holders; and that in the event any section or sections, or parts, of said tracks and rights of way, or depot grounds, or any other of the said structures can be sold and disposed of as now situated, to better advantage of the stockholders of the said Eastern Texas Railroad Company, that the same be sold and disposed of in such manner; and that the said defendant, the Eastern Texas Railroad Company be, and it is hereby authorized, to dispose of its rights of way, depot grounds, or any portion or parcel thereof to the best advantage of the stockholders of the said railroad company, either in connection with the salvage of the structures, or any part thereof, to the best advantage of the stock-holders; and that any such sales may be made by the said Eastern Texas Railroad Company at private or public sale, for cash or credit, as may be deemed to the best advantage of the said Railroad Company.

To which judgment and decree the plaintiff then and there in open court excepted and gave notice of appeal.

____ ____,

United States District Judge.

31 In the United States District Court, Western District of Texas, Austin Division.

In Equity.

323.

STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY et al., Defendants.

Assignments of Error.

Now comes the plaintiff in the above entitled cause and files the following assignments of error upon which it will rely upon its prosecution of its appeal in the above entitled cause, from the judgment for defendants made herein by this Honorable Court on the 11th day of August, 1922.

I.

The United States District Court for the Western District of Texas erred in giving judgment for defendants authorizing the sessation of operation of its railway and the dismantling of its road and refusing to enjoin said defendants from discontinuing operation and abandoning and dismantling said road.

II.

The United States District Court for the Western District of Texas erred in its judgment and decree authorizing defendant, the Eastern Texas Railroad Company, to abandon its railway in intrastate
32 and interstate commerce and to remove its ties, tracks, rails, and dismantle all its properties and dispose of same.

III.

The United States District Court for the Western District of Texas erred in its judgment and decree granting authority and permission to defendant, the Eastern Texas Railroad Company, to abandon operation of its railroad and to dismantle same as a common carrier in intrastate commerce, contrary to its charter obligation and contract to construct, maintain and operate its line of railroad during the existence of its charter.

IV.

The United States District Court for the Western District of Texas erred in its judgment and decree granting authority and permission to defendant, the Eastern Texas Railroad Company, to abandon operation of its railroad and to dismantle same as a common carrier in intrastate commerce, contrary to the statutes of the State of Texas requiring the maintenance and operation of said railroad during the existence of its charter.

Wherefore appellants pray that said judgment and decree be reversed in so far as authority and permission is granted to the defendant, the Eastern Texas Railroad Company, to discontinue operation of its road and abandon and dismantle its track and properties, and that said district for the Western District of Texas be ordered to enter a decree and judgment reversing its order dissolving the injunction and its decision that the law is for the defendant in said cause.

W. A. KEELING,
Attorney General;
WALACE HAWKINS,
Assistant Attorney General,
Solicitors for Plaintiff.

33 United States District Court, Western District of Texas, Austin Division.

In Equity.

No. 323.

STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD CO. et al., Defendants.

Petition for or Claim of Appeal.

To the Honorable — Court of the United States for the Western District of Texas:

Now comes the plaintiff herein, by W. A. Keeling, Attorney General for the State of Texas, and Walace Hawkins, Assistant Attorney General, its solicitors, and says that the plaintiff is aggrieved by the judgment and decree of this Honorable Court, entered in the above cause, on the 11th day of August, A. D. 1922, by which judgment and decree plaintiff takes nothing by its suit and the temporary injunction, restraining the defendants herein from abandoning the Eastern Texas Railroad Co., and ceasing and discontinuing operation of said road, or any part thereof, for the transportation of passengers in intrastate commerce was dissolved, and in which the defendant, the Eastern Texas Railroad Co., was authorized to abandon its railway as to intrastate, as well as interstate, traffic, and was permitted to remove its ties, rails and tracks and dismantle all of its structures and property and dispose of them by sale or otherwise, in that plaintiff, the State of Texas, is denied the right and prior — to effectively enforce the statutes of the State of Texas regulating, controlling and governing the abandonment of the operation and dismantling of the physical properties of intrastate railways; and further it is aggrieved in that said plaintiff is denied the right and power to compel the defendant, the Eastern Texas Railroad
34 Co., to comply with its charter contract and the pre-existing laws of the State of Texas, and is specifically prohibited in said judgment and decree, by which laws and contract it is compelled to operate its trains and railway system continuously until Nov. 1, 1925, the date of expiration of its charter.

Further, the plaintiff herein is aggrieved by the judgment of this Honorable Court, denying the plaintiff the remedies prayed for in his petition, wherein said plaintiff seeks to enjoin the Eastern Texas Railroad Co. from discontinuing operation and from abandoning and dismantling its road. From which judgment this plaintiff claims an appeal, and prays that the same be allowed by an order of this Honorable Court, and that the record may be duly certified

and forwarded to the Supreme Court of the United States, as is provided by law.

——— ———,
Attorney General;

——— ———,
Assistant Attorney General,
Solicitors for Plaintiff.

35 United States District Court, Western District of Texas, Austin Division.

In Equity.

No. 323.

STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD CO. et al., Defendants.

Order Allowing Appeal.

At a session of said court, held at 10:00 A. M., in the Federal Building in the City of San Antonio, Texas, on the — day of September, 1922.

Present: Hon. Duval West, District Judge.

On reading and filing, in the above entitled cause, the petition of plaintiff, for an appeal to the Supreme Court of the United States, it appearing to the court that the plaintiff having filed its assignments of error and claim of appeal, as required by the rules of the Supreme Court of the United States, it is

Ordered That an appeal be, and the same is hereby, allowed, as prayed for, from the judgment and decree of this court, made on the — day of August, A. D. 1922, dissolving the injunction, as prayed for by defendants, and authorizing and granting authority and power to defendants to abandon its railway as to intrastate, as well as interstate, traffic, and permitting it to remove its ties, rails and tracks, and to dismantle all of its structures and property, and to dispose of them, and in all things denying plaintiff the remedies prayed for.

———,
District Judge.

36 THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

The President of the United States to Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove, and E. J. Mantooth, Appellees, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within

thirty days from the date hereof, pursuant to appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Texas, in the cause wherein The State of Texas is appellant and the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, are appellees, to show cause, if any there be, why the decree rendered against the State of Texas, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 9th day of September in the year of our Lord one thousand nine hundred and twenty two.

Signed this, the 9th day of September, 1922.

——— ———,
United States Judge.

(Endorsed:) No. 323. E*g*. The State of Texas vs. Eastern Texas Railroad Co. et al. Citation. Marshal's Return. Service of this Citation is hereby accepted this — ——, 1922. E. B. Perkins, Daniel Upthegrove, E. J. Mantooth, Solicitors for Appellees, Filed — ——, 1922. D. H. Hart, Clerk, By —— ——, Deputy.

37 *Clerk's Certificate.*

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the foregoing on pages Numbered from 1 to 36, inclusive, contain a true and correct transcript of agreed record on appeal, decrees of the court, assignments of error, copy of citation therein, in Equity No. 323, styled The State of Texas vs. Eastern Texas Railroad Company et al., as appears of record and remains on file in my office at Austin, Texas.

Witness my hand and official signature and seal of said District Court, at office in the City of Austin, Texas, on this the 9th day of September, 1922.

[The Seal of the U. S. District Court, Western Dist. Texas, Austin.]

D. H. HART,
D. H. HART,
Clerk of the U. S. District Court,
By —— ——,
Deputy.

Endorsed on cover: File No. 29,230. Western Texas D. C. U. S. Term No. 680. The State of Texas, appellant, vs. Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, et al. Filed November 20, 1922. File No. 29,230.

FILED
MAR 6 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

No. 679. 145

THE STATE OF TEXAS, *Appellant*,

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL., *Appellees*.

No. 680. 146

THE RAILROAD COMMISSION OF TEXAS, ET AL., *Appellants*,

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL., *Appellee*.

SUPPLEMENTAL BRIEF FOR APPELLEES.

DANIEL UPTHEGROVE,
JNO. R. TURNEY,
Attorneys for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

IN THE

Supreme Court of the United States

No. 679.

THE STATE OF TEXAS, *Appellant,*

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL, *Appellees,*

No. 680.

THE RAILROAD COMMISSION OF TEXAS, ET AL, *Appellants,*

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL, *Appellee,*

SUPPLEMENTAL BRIEF FOR APPELLEES.

STATEMENT.

These are counter suits in Equity, one brought by the Appellee Railroad Company to enjoin the State Officers from interfering with the dismantlement and salvaging of its road by attempting to enforce certain

statutory penalties, and the other by the State to enjoin Appellees from dismantling or salvaging the railroad.

Subsequent to the former decision of this Court in both cases, that the order of the Interstate Commerce Commission did not authorize the abandonment of the railroad as to intrastate traffic, the pleadings were amended and a trial had in the Distirct Court upon the issue as to whether or not to prevent the Appellee from salvaging its property would deprive it thereof contrary to the due process clause of the Fourteenth Amendment.

Upon the trial, the District Court found that the railroad could be operated only at an annual loss in operating expenses alone of over $60,000.00, that before operations (which had been discontinued in May, 1921) could be resumed expenditures of $185,000.00 for deferred maintenance must be made, that the value of the property had shrunk from over $458,000.00 in 1919 to less than $50,000.00 at the time of the trial and that the Company was without money or credit or means to resume or continue operation. Upon this finding of fact, it concluded as a matter of law that the Company could not be compelled to resume operation of the railroad or prevented from dismantling and salvaging it.

DEFINITION OF ISSUES.

Upon these appeals appellants do not challenge the soundness of the findings of fact made by the District Court, nor do they seriously contend that there is any way in which the operation of the railroad could be resumed. The issues are now narrowed down to the question as to whether the State or the stockholders

are entitled to the salvage of a Texas railroad which because of lack of business and revenues can no longer be operated. In its last anlysis this is no more or less than a contest over the right to the salvage of an abandoned railroad.

The State claims title to this property upon two grounds. In the first place it contends that in its charter the Railroad Company expressly and impliedly agreed to continue the operation of this railroad until November, 1925, that the public has been damaged by the breach of this contract, and that the property of the railroad should be subjected to the payment of these damages. In the second place it contends that there are now in force and were in force at the time of Appellee was granted its charter Texas Statutes requiring perpetual operation and forever forbidding the abandonment or removal of any railroad under any circumstances whatsoever, that these statutes having been violated Appellee's property may be taken for the payment of penalties therein provided.

Upon the other hand Appellee contends that its title to the property is unclouded, that there was no charter agreement to perpetually continue operation and there were no valid statutes then in force which interfered with its constitutional right to salvage its property.

BRIEF AND ARGUMENT.

1. Appellee Has the Right Under the Fourteenth Amendment to the Federal Constitution to Salvage Its Railroad Unless It Has Lost That Right Either Through Express Contract or by Statute.

In the case of Bullock vs. Florida, 254 U. S. 513, the court speaking through Mr. Justice Holmes, said:

> "Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the state and have been allowed to exercise the power of eminent domain."

In the case of Brooks Scanlon Co. vs. Railroad Commission, 251 U. S. 396, the court held that the right to salvage an abandoned railroad and to cease operating a railroad which could only be operated at a loss was a property right protected by the fourteenth amendment.

In the instant case the trial court found under the facts that the Eastern Texas Railroad could not be operated either now or in the future save at a great annual loss; that the capital value of the property had shrunk from $450,000 to less than $50,000; that it was without credit, money or assets and that there was no chance that in the future traffic sufficient to support the property could be developed.

Realizing that under this state of facts, which is now admitted to be true, the appellee had the constitutional right to salvage its property, upon the authority of these two cases, the appellants seek to distinguish the case at bar from those authorities by insisting that under its charter the railroad company has expressly agreed to perpetually maintain and operate the property and also that by accepting a charter at a time when there was a statute forbidding the abandonment of railroad within Texas the appellee has waived any rights that it might otherwise have had under the provisions of the fourteenth amendment.

2. Under the Texas Constitution There Was and Can Be No Charter Contract Between the State of Texas and a Corporation Created by It.

At the outset appellee contends that regardless of what agreements may have been contained in its charter and regardless of any provisions of statutory law then existing the legislature was without authority to contract with reference to the granting of any franchise or privilege to a corporation.

Section 17 of Article 1 (Bill of Rights) of the Texas Constitution of 1876 provides "that no irrevocable or uncontrollable grant of special privileges or immunities shall be made but that all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

In the case of the City of San Antonio vs. San Antonio Service Co., 255 U. S. 547, a street car company had been granted a franchise by a municipal corporation to operate street cars within the city. As a part of this franchise the car company agreed to transport passengers for a 5-cent fare. Subsequently the street car company brought suit in the Federal court seeking to enjoin the enforcement of a city ordinance which would prevent it from increasing this 5-cent fare, upon the ground that the fare was confiscatory. The city defended upon the ground that the fare was a contract one and that however disastrous the results of the contract might be to the car company it could not escape from the obligations thereof. This court, however, held that under the provision of the constitution quoted above the city could not enter into a contract with a public service corporation as to railway fares so as to prevent their increase if they were so low as to be confiscatory under the fourteenth amendment.

The charter of the appellee in this case was granted on November 1st, 1900, while the above provision of the Texas Constitution was in effect. Therefore under the decision in the San Antonio case that charter was not such a contract as would prevent either the state from thereafter repudiating it or the railway company from thereafter claiming any right under the Federal Constitution inconsistent therewith.

3. If Appellee's Charter Does Constitute a Binding Contract Between the State and Railway Corporation the Full Extent of the Latter's Obligation Thereof Was to Maintain and to Operate the Railroad Only so Long as the Public Interest Demanded and Justified It.

Appellee's charter is a contract between it and the state wherein the state in order to secure a means of transporting the traffic of the public between the termini by the railroad company granted to it the right to construct, own and operate the railroad in consideration of which the railroad company assumed the obligation to transport the traffic by means of the construction and operation of the railroad. The subject of the contract was the public interest in having its traffic moved. The performance of the contract depended upon the continuance of this public interest and this traffic. A condition was necessarily implied that passing away of this subject matter—the traffic in question—terminated the contract. The rule is thus stated by this court in the case of The Tornado, 108 U. S. 342:

> "In Taylor vs. Caldewll, 3 Best and S, 826, it is laid down as a rule that in contracts in which the

performance depends upon the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The reason given for the rule is that without any express stipulation that the destruction of the person or thing shall excuse performance that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

Applying this rule to this case it is apparent that the parties, the state representing the public on the one hand and the railroad company upon the other, contracted upon the basis of the continued existence of the traffic to be transported between the termini of the railroad. Neither the public nor the state has any interest in the matter after this traffic passes away.

This rule has been uniformily applied by the courts in cases where the traffic on a railroad becomes insufficient to supply the revenues necessary to pay the operating expenses. In such cases this fact is taken as conclusive evidence that both the public interest, the thing for which the state bargained, and the traffic, the thing for which the railway company bargained, have disappeared.

Commonwealth vs. Fitchburg R. Co. 12 Gray (Mass.) 180.
Sherwood vs. Railway Co. 94 Va. 291.
State vs. Dodge City Ry. 53 Kan. 329.
People vs. Colo. Ry. 42 Fed. 638.
Jack vs. Williams 113 Fed. 823 (Affirmed in 145 Fed. 281).

As heretofore stated this court has recently in the Brooks Scanlon and Bullock cases extended the application of this principle by holding that this implied condition of the charter contract was a property right of which the railway company could not be deprived consistently with the fourteenth amendment.

Appellee's charter was granted under Section 6408, Texas Civil Statutes, being page 17 of the Acts of 1889, which reads as follows:

> "The persons proposing to form a railroad corporation shall adopt and sign articles of incorporation which shall contain: (1) the name of the proposed corporation; (2) the places from and to which it is intended to construct the proposed railroad and the intermediate counties, etc. * * * (3) the place at which it shall be established the offices * * * (4) the time of the commencement and the period of the continuation of the proposed corporation; (5) amount of the capital stock * * * (6) names of the several parties forming the corporation; (7) names of the members of the first board of directors; (8) number and amount of the shares in the capital stock in the proposed corporation."

In conformity with the provisions of this article appellee's articles stated that it was formed for the purpose of "constructing, owning, maintaining and operating" a railroad. Article four named the time of the commencement of the corporation as November 1st, 1900, and the term of the charter as twenty-five years.

There was nothing unique about the form of this charter. Nothing which distinguishes it in any manner from the charter of the railroad corporation that was before the court in the Bullock case from which appellant seeks to distinguish this case. The charter

in that case was granted under the provisions of Section 4050 of the revised statutes of Florida, which provides: "The proposed charter of an intended corporation must be subscribed by three or more persons and shall set forth: (1) the name of the corporation and the place or places of business; (2) the general nature of the business or the businesses to be transacted; (3) the amount of the capital stock, etc.; (4) the time for which it is to exist; (5) by what officers it is to be conducted; (6) the highest amount of indebtedness, etc.; (7) the names and addresses of the subscribers, etc.

A charter granted under this statute would be in almost exactly the same words as the charter of appellee in this case. There being no difference in the charters the decision of the Bullock case that there was no contract to continue the operation, but that the obligation to continue to do so was conditioned upon the continuance of the existence of a traffic sufficient to pay the expense thereof controls and rules this case.

4. There Is No Valid Statute of the State of Texas Which Forbids the Salvaging of a Railroad When Its Traffic Is Insufficient to Pay Its Operating Expenses.

The state contends that this case is not controlled by the Brooks Scanlon and Bullock cases cited supra because there existed upon the statute books of the state at the time the charter was granted Article 6676 and 6625 of the revised statutes of Texas of 1911.

Article 6676 merely requires that the railroads shall continue to operate from day to day. The obligation imposed is substantially the same as that imposed by the charter and is limited by exactly the same implied

limitations; *i. e.*, the operation is required only so long as the traffic is sufficient to bear it.

Article 6625 is set out in full at pages 12 and 13 of the printed transcript. The district court held that this article does not take this case from without the decision of the Brooks Scanlon and Bullock cases for the following reasons: (1) The statute applies only to the rights and liabilities of purchasers of railroads upon foreclosure or reorganization and not to a corporation which originally constructed the railroad; (2) if applicable the statute in the instant case cannot be lawfully enforced since a state may not in imposing conditions upon the exercise of corporate franchises exact a waiver of a corporation's constitutional right to assert the invalidity any law which deprives it of its property without due process of law. These in their order.

(a) THE STATUTE DOES NOT APPLY TO APPELLEE.

The analysis and chronological history of the statute is set out exhaustively in the opinion of the District Court at pages 12 and 13 of the transcript. There is little occasion for further comment, than is there made.

Section 1 of the Act is entitled: "As to rights of purchasers of roadbeds, etc., sold for debt." It provides that in case of any sale of the roadbed, track, franchise or chartered rights of a railway company as mentioned in Article 4260 (an article which provides that where a railroad and its franchises are sold the purchaser shall take the property and charter rights and have the right to operate the road), the purchaser should be entitled to organize a corporation having all the powers and privileges conferred by law on char-

tered railroads; provided that the property purchased should be subject to all of the liabilities of the old corporation and provided further that the purchaser should acquire no rights in conflict with the present constitution and "nor shall the main track of any railroad once constructed be abandoned or removed."

It is upon this last clause that the State bases its contention. The Eastern Texas Railroad Company did not purchase its railroad or a railroad franchise. Neither it nor its property nor franchises have ever been sold for debt. It is the original corporation that constructed the property and has continuously owned it since that time. The contention that the sale by some of the original stockholders of their shares of the capital stock of the corporation to the St. Louis Southwestern Railway Company amounted to a sale of either "the roadbed, track, franchise or chartered right of a railway company" is two patently absurd to require refutation. If that contention be sound and it be held that the St. Louis Southwestern Railway Company is the owner of the Eastern Texas Railroad then the very ground upon which the original decision of this court was based is destroyed, since if that is the case the St. Louis Southwestern Railway Company being an interstate carrier lying without the state of Texas, the continued operation of the property at a loss would unquestionably be a burden upon interstate commerce and the certificate of the Interstate Commerce Commission heretofore issued would permit the abandonment of the property.

The State contends that the clause of the statute quoted above is not limited to the purchasers of so-called sold out railroads but applies to all railroads within the state. Such a construction is contrary to

a number of elementary rules of statutory construction and is refuted by the most casual examination of the statute and the purposes for which it was enacted.

In the absence of the original section of which this was an amendment a purchaser of the railroad property would not acquire the franchises and charter rights and in the absence of such rights would be unable to operate the railroad. The purpose of this statute was to give to such purchasers these franchise and charter rights. But these rights were given to the purchasers upon three conditions named in the statute (1) that the new corporation would assume the liabilities as well as the rights of the old corporation; (2) that no right of the old corporation which was in conflict with the new constitution would survive to the new corporation, and (3) that the main track of the railroad so acquired should not be abandoned or removed.

As the District Court pointed out, to construe the act as the State seeks to construe it would make the statute unconstitutional in this: The title of the act restricts its purpose to the definition of "rights of purchasers of roadbeds sold for debt." The title does not at any place indicate that the act refers or intends to refer to all railroad corporations or to any other corporations than those purchasing railroad property at foreclosure sale. Section 35 of Article 3 of the Texas constitution of 1876 provides that "no bill shall contain more than one subject which shall be expressed in the title; if any subject shall be embraced in the act which shall not be so expressed in the title such act shall be void only as to so much thereof as shall not be expressed." Unquestionably under this provision of the state constitution since the provision

making the act applicable to all railroads was not only not expressed in the title but was by the terms of the title excluded therefrom the act could not lawfully be construed to apply to such other corporations even if it attempted expressly so to do.

The State contends that a contrary construction was placed upon the statute by the State Supreme Court in Enid O. & W. R. Co. vs. State, 108 Texas 239. If the language used in that opinion is considered separate and apart from the case which was before the court it is susceptible to the broad construction the state puts upon it. However, an examination of that case will reveal the fact that the railroad there involved was one which had been purchased at foreclosure sale and that the question whether or not this statute applied to all railroads as well as to sold-out railroads was not only not involved but was not discussed by the court in its opinion.

Moreover, the construction of this statute by the state court would not be binding upon this court. It is contended by the state that the acceptance of charter by appellee while this statute was in force amounted to a contractual waiver of appellee's right guaranteed by the Federal Constitution that its property would not be taken without compensation. This question whether or not a citizen has forfeited or waived property rights guaranteed it by the Federal Constitution is a Federal question, in the determination of which the Federal courts are not bound by state authorities.

(b) But even if it be conceded for sake of argument that this statute did apply to all railroads, including appellee, we insist that its enforcement in this case is unlawful for the reason that a state may not in

imposing conditions upon the privilege of exercising corporate franchises exact from the corporation so created a waiver of rights guaranteed it by the Federal Constitution.

In the Bullock case the court in stating the principle that a railroad corporation may not be constitutionally prohibited from salvaging the remains of its railroad which can be operated only at a loss does so with this implied qualification: "Apart from statute or express contract." We respectfully insist that no such qualification exists with respect to a state statute which a corporation is required to impliedly accept as a condition precedent to the insuance of its charter.

In the Bullock case the Florida Supreme Court held that at the common law as that law existed in that state a railroad once dedicated to the public use could not thereafter be abandoned or dismantled. Under the theory of our legal institutions this decision had the effect merely of declaring what had always been the common law within the state of Florida. The jurisdiction of the State Supreme Court to declare what the law had been and was is just as plenary as the power of the state legislature to declare what the law shall be in the future. A rule of decision of the common law of a state is just as binding upon this court as a state statute providing for the same rule. A state statute is no more potent to overcome a provision of the Federal Constitution than is a rule of the common law as declared by the highest court of the state. A state legislature has no more power than has a state court to emasculate the Federal Constitution. If it be objected that this court has jurisdiction to review a decision as to common law rules which affect Federal rights, is it not equally true that this power is no

greater than the power to review a state statute affecting the Federal right in precisely the same manner? To the extent that the Federal Constitution denies to a state court the power to finally determine the common law in any particular case to precisely the same extent it denies a power in the state legislature to fix a future law.

The decisions of this court unhappily are not in complete harmony upon this question. In the case of Street Railway Co. vs. Mass., 207 U. S. 79, the opinion of the majority of the court was predicated upon the holding that a street car company could not complain of the invalidity of a state statute fixing rates for children's tickets as in violation of the fourteenth amendment because the statute was in effect at the time the company was chartered. We have been unable to distinguish this case from the case at bar and if it has not been overruled, but is still controlling it decides this particular proposition against appellee.

However, the case is inconsistent with and contrary to a number of cases which have both preceded and followed it.

In the case of Cargill vs. Minnesota, 180 U. S. 452, the appellant there contended that a state statute requiring the licensing of warehouses was unconstitutional since some of the conditions which would be imposed by the license would take its property without due process of law. In overruling this contention this court said:

> "The defendant, however, insists that some of the provisions of the Statute are in violation of the Constitution of the United States and if it obtained the required license it would be held to have accepted all of its provisions and (in the

> same words of the statute), 'thereby have agreed to comply with the same.' The answer to this suggestion is that the acceptance of a license in whatever form will not impose upon the licensee an obligation to respect or comply with any regulations prescribed by the state railroad or warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license or if it sought to revoke one granted because the applicant in the one case or the licensee in the other refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

A somewhat similar but not quite so apparent an application of the same principle was made in the Northern Securities case, 193 U. S. 347. In that case the contention was made that a Federal court could not order the dissolution of a corporation chartered by a state since the state had reserved unto itself the sole power to incorporate and fix the terms of the charters of their corporations. In overruling this contention this court said:

> "Every corporation created by a state is necessarily subject to the supreme law of the land. * * * Of course every state has in a general sense plenary power over its corporations. * * * The court has steadily held to the doctrine, vital to the United States as well as to the states, that a state enactment even if passed in the exercise of its acknowledged powers must yield in case of conflict to the supremacy of the Constitution of the United

States. * * * This results from the nature of the Government as well as from the words of the Constitution."

These two cases preceded the Street Railway Case cited supra and were it not for the fact that they have been followed by cases subsequent to the Street Car case would be deemed to have been overruled by it.

The first of these cases was that of C. M. & St. P. Ry. Co. vs. Wisconsin, 238 U. S. 491, in which the court in holding unconstitutional the Wisconsin Berth law overruled the contention that the railroad by accepting a charter giving the state power to pass subsequent laws which it agreed to obey, waived its right to contest such laws upon the ground that they took its property without compensation. Obviously there is no difference in principle between the acceptance of a charter wherein the corporation agrees to accept all future laws and one in which it agrees to accept all present laws. If the acceptance of a charter agreeing to accept all future laws does not amount to a contractual waiver of the corporation's right to challenge the constitutionality of such laws then it must necessarily follow that the acceptance of a charter agreeing to accept all present laws (in this case by implication only) does not waive that right. If the former contract is subject to the qualifications that such future laws are subject to the limitations imposed by the Federal Constitution then the latter contract is likewise subject to the same qualifications and the present laws are subject to the same limitations.

The most recent case upon this subject is that of Terral vs. Burke Construction Co., 257 U. S. 529, decided in January of last year. In that case a Missouri corporation accepted a license to do business in the state of Arkansas under the terms and provisions of

a statute which made it a condition precedent to the issuance and continuance of such license that such corporation would waive its right to remove cases brought against it from the state to the Federal court and which also provided that in case the corporation should attempt to remove a case to the Federal court the Secretary of State should thereupon forfeit its right to do business within the state. After having violated this last provision of the statute the construction company brought suit in the Federal court to enjoin the Secretary of State from forfeiting its charter. The state of Arkansas contended that it had the full and unlimited power to license or refuse to license a foreign corporation to do business within its boundary and to impose upon the granting of such license such terms and conditions which it saw fit and that when a foreign corporation accepted such a license it thereby contractually waived its rights under the Federal Constitution, just as the State of Texas in this case contends that it had the full power to impose any conditions it saw fit upon the granting of a corporate franchise and that by accepting the benefits of such a franchise under such conditions appellee contractually waived the right to be protected against unlawful deprivation of property guaranteed it by the Federal Constitution.

This court, speaking through the Chief Justice, clearly and unequivocally overruled such a contention, although it was necessary to overrule expressly two of its previous decisions. It did so in the following language:

> "The principle established by the more recent decisions of this court is that a state may not in imposing conditions upon the privilege of a foreign corporation's doing business in the state exact

from it a waiver of the exercise of its constitutional right to resort to the Federal courts or thereafter withdraw the privilege of doing business because of its exercise of such right whether waived in advance or not."

CONCLUSION.

This is not a controversy in which the public interest is in any way involved. It is a controversy merely over the salvage of a defunct railroad. Should the contention of the state be sustained, it would not result in a single passenger or in a single pound of freight being carried over the railroad. Whatever may be the command of the statute, or the decree of the courts, the economic law has already operated and the railroad has ceased forever to be a public highway for the very simple reason that the public has ceased to use it. Stripped of all the legal contentions which have been made, the merits of this case revolve about one question and only one:

Does the salvage of an abandoned railroad whose owners have devoted to the public use a property which cost them over $450,000 for over twenty years, receiving not one cent in return upon their investment, and in addition have expended over $150,000 in operating losses and have suffered a loss in capital value of over $400,000, belong to those owners who have attempted to benefit the public, or does it belong to the public who have refused to accept and enjoy those benefits?

Respectfully submitted,

DANIEL UPTHEGROVE,
JNO. R. TURNEY,
Attorneys for Appellee.

A112-10-22-50

No.....

In the Supreme Court of the United States

STATE OF TEXAS, APPELLANT,
vs.
EASTERN TEXAS RAILROAD COMPANY ET AL.,
APPELLEES (No. 323).

AND

EASTERN TEXAS RAILROAD COMPANY
vs.
RAILROAD COMMISSION OF TEXAS ET AL. (No. 325).

APPELLANT'S MOTION TO ADVANCE.

Now comes the State of Texas, by W. A. Keeling, Attorney General, appellant herein, and moves and prays the court to advance the two above entitled causes on the docket of this court, and set the same for hearing at as early a date as the court may deem advisable.

As the statement of the matters involved in the appeal in each of these causes, and reasons for this motion, appellant submits the following:

I.

STATEMENT OF THE CASES.

Cause No. 323 in equity is a suit brought by the State of Texas to enjoin the Eastern Texas Railroad Company from discontinuing operations and from abandoning and dismantling its road. The railroad company, by counter claim and cross action seeks an injunction against the State to prevent the State from interfering or preventing the railway company from dismantling or abandoning its lines of railway.

Cause No. 325 in equity is a suit wherein the Eastern Texas Railroad Company sought an injunction to prevent the Railroad Commission of Texas, the Attorney General, and the other defendants therein named from interfering with the railroad company in carrying into effect its intention to permanently abandon the operation and dismantle its lines of railway.

The two cases relate to and involve the same questions of law and fact, and were submitted and tried together in the district court, and the findings of fact and opinion were made to apply to each case and each transcript involves the same record on appeal.

On June 3, 1920, appellee, Eastern Texas Railroad Company, applied to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity permitting said railway company to abandon the operation and dismantle its lines of railway, which application was by the Interstate Commerce Commission granted on the 2nd day of December, 1920, and the certificate issued accordingly.

On June 14, 1920, subsequent to the making of said application by appellee, and prior to the granting thereof, appellant, State of Texas, obtained an injunction in the State District Court of the State of Texas, in Travis County, in the State of Texas, prohibiting appellee from abandoning and dismantling its road under the authority of any certificate that might thereafter be issued by the said Interstate Commerce Commission; said cause was by appellee removed to the United States District Court for the Western District of Texas, where it was filed and entered on the docket of said court as cause No. 323 in equity.

Upon a trial in said United States District Court, said injunction was dissolved and appellant, the State of Texas, appealed the cause to this court, where the same was docketed

as cause No. 298, and was determined and judgment rendered therein by this court on March 13, 1922. (42 Sup. Ct. Rep., 281.) Pending appeal in said cause, this court issued its order April 21, 1921, suspending the order of the district court, whereby the injunction was dissolved below and required the status quo of the property to be preserved. Appellee ceased the operation of its lines of railroad May 1, 1921, and has not operated the same, or any portion thereof, since that date.

In the opinion delivered by this court reversing said cause, the same was remanded for further proceedings in accordance with said opinion. This court held, in substance, in said opinion that the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission adequately sanctioned and authorized a discontinuance of the railroad's operation in interstate and foreign commerce, and the abandonment thereof, but held that under the facts presented in the record, the said Interstate Commerce Commission were without authority to authorize the abandonment of said railroad, and the dismantling thereof, in so far as the same was used and operated in purely intrastate commerce.

II.

Upon the filing of the mandate from this court in the United States District Court for the Western District of Texas, appellee, the Eastern Texas Railroad Company, amended its counter claim and cross action, whereby it more fully set up its right and authority to abandon and dismantle its lines of railway under the provisions of the Fourteenth Amendment to the Constitution of the United States; in such amended pleading it was set forth fully that if appellee was compelled to operate its road, it would result in the confiscation and the taking of its property without due process of law. Material

and specific allegations were made showing that appellee was insolvent; that its revenues were insufficient to pay operating expenses, or to allow any return on the value of its property or an investment therein, and that there was no reasonable prospect for an improvement or increase in the earnings of appellee.

Appellant, the State of Texas, contended in its pleadings that appellee was compelled by its charter contract with the State of Texas, and by express provisions of the statutes and the Constitution of the State of Texas, to maintain and operate its lines of railway under any and all conditions, in the transportation of intrastate commerce.

III.

On August 11, 1922, both of said causes, towit: cause No. 323 in equity, entitled State of Texas vs. Eastern Texas Railroad Company et al., and cause No. 325, entitled Eastern Texas Railroad Company vs. Railroad Commission of Texas et al., on the docket of the District Court for the Western District of Texas, came on for trial, and were submitted and tried together as aforesaid, and judgment was rendered in cause No. 323, dissolving the injunction and dismissing appellant's petition, and a decree was entered therein authorizing appellee to abandon and dismantle its lines of railway as to intrastate commerce, as well as interstate commerce, and to remove its tracks, structures, etc., and dispose of its property by sale or otherwise; in cause No. 325 said court granted the appellee, the Eastern Texas Railroad Company, a perpetual injunction prohibiting the Railroad Commission of Texas, the Attorney General of Texas, and the other defendants therein named, from interfering with appellee's rights to abandon and dismantle its lines of railroad.

REASONS FOR THE MOTION.

Appellant respectfully shows to the court that the decree granted herein against appellant had the effect of declaring null and invalid a large portion of the laws of the State of Texas affecting corporations, and particularly railroad corporations. Appellant shows that there are many short lines railroads in the State of Texas, and throughout the United States, whose situation is similar to that of the Eastern Texas Railroad Company, as disclosed in this record. Many of the owners of such roads are now undertaking, or will in the near future undertake to abandon and dismantle their lines of railway, which will be done to the great inconvenience, discomfort and financial loss to the immediate communities supplied by such roads, and all to the general detriment of the public welfare.

These causes have once been adjudicated in part by this court upon their merits, and are now brought here again by appeal for a review of the questions determined on the second trial.

As above stated, the appellee, the Eastern Texas Railroad Company, has since May 1, 1921, ceased the operation of its lines and abandoned the transportation of freight and passengers; its bridges, ties, steel rails and other property and structures, its right-of-way, roadbed and all other fixtures that constitute a railroad, are fast deteriorating, and a large expense will be necessary, which expense will be increased rapidly by the lapse of time, to rehabilitate said railroad if appellees should be required to operate and maintain the same. The parties hereto and the public are left in a condition of uncertainty until the questions involved herein are determined and finally adjudicated by this court; all of which constitutes an emergency and urgent necessity for the immediate determination and settlement of the questions involved in this litigation.

Wherefore, appellant, being joined therein by appellee, moves and prays this honorable court that both of said causes be advanced on the docket and set for hearing and submission at as early a date as is consistent with the business of the court, and for such other and further relief in the premises as may be proper.

Respectfully submitted,

Attorney General.

Assistant Attorney General.

Counsel for Appellant, the State of Texas.

We join in the foregoing motion and application to advance:

E. J. MANTOOTH,
E. B. PERKINS,
J. R. TURNEY,
W. B. HAMILTON,

Solicitors for Appellee, Eastern Texas Railroad Company.

E. J. Mantooth,
E. B. Perkins,
J. R. Turney,
W. B. Hamilton,
Solicitors for Appellee, Eastern Texas
Railroad Company.

SUBJECT INDEX.

LIST OF AUTHORITIES.

A133-1122-50

No.....

In the Supreme Court of the United States

OCTOBER TERM, 1922

(In Equity No. 323.)

THE STATE OF TEXAS, APPELLANT,

vs.

EASTERN TEXAS RAILROAD COMPANY, APPELLEE,

AND

(In Equity No. 325.)

THE RAILROAD COMMISSION OF TEXAS ET AL.,
APPELLANTS,

vs.

EASTERN TEXAS RAILROAD COMPANY ET AL.,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

STATEMENT OF CASES.

These cases are appeals from the orders of the Court of the United States for the Western District of Texas entered August 11, 1922, wherein is case No. 323 in said court and styled, "The State of Texas vs. the Eastern Texas Railroad Company et al.," the State was denied relief prayed for and the injunction restraining the Eastern Texas Railway Company from abandoning operation and the dismantling of its road, granted by the District Court of the State of Texas, Fifty-third Judicial District, was dissolved; and in Cause No. 325, styled "Eastern Texas Railroad Company et al. vs. Railroad Commission of Texas et al.," the Eastern Texas

Railroad Company, a Texas corporation and common carrier, was authorized to abandon its railroad as to intrastate as well as interstate traffic and to remove its ties, rails, track, and dismantle all of its structures and property, and dispose of them as it may seem proper. In the last case the court made perpetual its previous temporary restraining order, thereby perpetually and forever restraining the Railroad Commission of Texas, Attorney General and other State authorities from thereafter interfering in any manner with the authority granted to the Eastern Texas Railroad Company to cease the operation and to dismantle its line of railroad.

The parties hereto, the State of Texas and the Railroad Commission of Texas, and the Eastern Texas Railroad Company, will be referred to, for brevity, as the State, the Commission and the Railroad Company, respectively.

On June 3, 1920, the Railroad Company applied to the Interstate Commerce Commission for authority to abandon operation and maintenance of its road. July 14, 1920, the State obtained an injunction from a State court restraining the contemplated abandonment, subsequently the cause was removed to the trial court herein and styled "State of Texas vs. Eastern Texas Railroad Company, in Equity No. 323." December 2, 1920, the Interstate Commerce Commission granted its certificate authorizing abandonment of said road and the injunction granted by the State court was dissolved, whereupon, on December 20, 1920, the Railroad Company brought its suit styled "Eastern Texas Railroad Company vs. Railroad Commission of Texas et al., No. 325," and on April 29, 1921, obtained from the trial court below a temporary injunction restraining the State authorities from interfering with the proposed abandonment.

On April 21, 1921, the Supreme Court, in Cause No. 298 (Equity No. 323 below) suspended the order of the district court dissolving the State court injunction, whereupon, on September 10, 1921, the State brought suit in the District Court for the Eastern District of Texas to annul the certificate granted by the

Interstate Commerce Commission. On a motion to dismiss in this cause and granted September 21, 1921, thereafter an appeal was filed in the Supreme Court October 1, 1921, No. 563.

The Supreme Court, on March 13, 1922 (42 Supreme Court Reporter, 281) reversed and remanded these cases numbered 298 (323) and 563, stating at the time that the certificate was sufficient only to authorize the Railroad Company to discontinue its business in interstate and foreign commerce.

Thereafter the Railroad Company, in case No. 325, relying upon the certificate for authority to abandon interstate and foreign commerce, sought an order from the district court authorizing it to abandon in intrastate commerce and to dismantle, salvage and sell its road. On May 13, 1922, in Cause No. 323, the Railroad Company asked for injunction to prevent State authorities from interfering with its contemplated abandonment. (Tr., 1-4.) On the trial, June 19, 1922, of both cases, the relief first described above was granted to the Railroad Company.

The Railroad Company, both in pleadings and evidence, presented its reasons upon which the proposed decrees were entered. Among others it relied upon (1) the insolvency of the company; (2) insufficiency of revenues to meet expenses and give a fair rent upon the investment; (3) compulsory future operation would result in taking its property without due process in contravention of the Fourteenth Amendment, Constitution of the United States, and certain constitutional clauses in the Texas Constitution. Whereas, the State and Commission asserted that (1) the Railroad Company had obligated itself, by its charter contract, to maintain and operate its road for the term of its charter, unexpired; (2) that by express statutes of the State the Railroad Company is further bound and obligated to maintain and operate its road; (3) that the Fourteenth Amendment was without application; (4) and the facts of (a) insolvency, (b) insufficiency of revenues, and (c) reasonable prospect therefor were contested. (Tr., 4.)

SPECIFICATION OF ERRORS RELIED UPON.

I.

The United States District Court for the Western District of Texas erred in giving judgment for defendants authorizing the cessation of operation of its railway and the dismantling of its road and refusing to enjoin said defendants from discontinuing operation and abandoning and dismantling said road.

II.

The United States District Court for the Western District of Texas erred in its judgment and decree authorizing defendant, the Eastern Texas Railroad Company, to abandon its railway in intrastate and interstate commerce and to remove its ties, tracks, rails, and dismantle all its properties and dispose of same.

III.

The United States District Court for the Western District of Texas erred in its judgment and decree granting authority and permission to the defendant, the Eastern Texas Railroad Company, to abandon operation of its railroad and to dismantle same as a common carrier in intrastate commerce, contrary to its charter obligation and contract to construct, maintain and operate its line of railroad during the existence of its charter.

IV.

The United States District Court for the Western District of Texas erred in its judgment and decree granting authority and permission to defendant, the Eastern Texas Railroad Company, to abandon operation of its railroad and to dismantle same as a common carrier in intrastate commerce, contrary to the statutes of the State of Texas requiring the maintenance and operation of said railroad during the existence of its charter.

ARGUMENT.

I.

A Texas railroad corporation is under contract obligation (charter) and statutory duty to continue operation and maintenance of its railroad during the period of its charter.

A. THE EASTERN TEXAS RAILROAD COMPANY IS UNDER CONTRACT TO MAINTAIN AND OPERATE ITS RAILROAD CONTINUOUSLY FOR THE TERM OF ITS CHARTER—TO OCTOBER, 1925.

STATEMENT.

The Eastern Texas Railroad Company was incorporated October 27, 1900, under general laws for a term of twenty-five years—expiring October, 1925. The charter conditions and laws applicable to the Railroad Company became part of its charter, contract powers and liabilities. (Dartmouth College Case, 4 Wheat., 518; Northern Securities Co. vs. United States, 193 U. S., 347.) (Tr., 12.)

Although as stated in the Bullock case, 254 U. S., 521, that "No implied contract that they will do so (continue operation) can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise a power of eminent domain." Yet, so far as Texas corporations are concerned, there is the express agreement that the road will continue operation and will be maintained during the term of its charter. That this obligation is part of the charter contract of Texas corporations, we think is now undeniable. The Supreme Court, in the I. & G. N. R. R. Case vs. Anderson County, 246 U. S., 443, in stating the elements of a railroad charter contract under the Texas law expressly stated that the provisions of Title 115, Revised Statutes, 1911, were a part of the charter obligations. Mr. Justice Holmes, who also wrote the opinion in the Brooks Scanlan case, said:

"A corporation organized under general laws expressly declaring that charters thereunder should be subject to the provisions and limitations imposed by law while another act prohibited changing locations of railroad offices and shops in certain cases, that regardless of the constitutionality of the law, it was a condition of its incorporation of which it could not complain."

The court, through Mr. Justice Holmes, took occasion to specifically mention the proviso of March 29, 1889, to the effect "that the main track once constructed and operated should not be removed." (Article 6425, Title 115, Revised Statutes, 1911.) To the same effect—Ricard vs. American Metal Co., 246 U. S., 204. We take it to be true that the Railroad Company, by its charter contract, was under obligation to operate and maintain its road for the terms of its charter and that a State may compel performance of these obligations; it is enforcement of contract rights.

Horn Silver Mining Co. vs. New York, 143 U. S., 313.

Robbins vs. Shelby Co., 120 U. S., 489.

I. & G. N. R. R. Co. vs. Anderson, 106 Texas, 60.

B. TEXAS RAILROAD COMPANY IS UNDER STATUTORY DUTY TO MAINTAIN AND OPERATE ITS RAILROAD DURING THE TERM OF ITS CHARTER.

Statement.

The Eastern Texas Railroad Company was incorporated November 18, 1900, for twenty-five years; the line was constructed to Kinnard in 1901-1902. The company was promoted and financed by individuals interested in the Texas and Louisiana Lumber Company, subsidiary to the Central Coal and Coke Company of Kansas City, Missouri. The $150,000 capital stock was increased in 1902 to $1,000,000, par value $454,500. There are no outstanding bonds. September 1, 1916, the St. Louis Southwestern Railroad Company bought the stock of the Eastern Texas Company, except qualifying shares, and has since operated the road. There is a substantial identity between the officers of both companies. (Tr., 6.)

Title 115, Articles 6676 and 6625, and Article 10, Section 2, Texas Constitution, impose the statutory duty upon Texas Railroad Company to maintain and operate their roads during the term of a charter contract. Article 6676 requires daily operation. Although the trial judge holds "That the prohibitory provisions (Article 6625) against abandonment or removal by a railroad company apply only to the case of a 'sold out' corporation." (Tr., 21.) Yet we respectfully submit that the following decisions of the State courts have already defined the meaning of the statute of Texas contrary to this interpretation. The law of the State is settled to the contrary.

State of Texas vs. Enid, Ochiltree & Western Railroad Co., 108 Texas, 239, 191 S. W., 560, 181 S. W., 498.

State vs. Sugarland Railroad Co., 163 S. W., 1047.

In the first case mentioned above the court stated:

> "By the terms of the contract the State procured for its citizens the benefits to be derived by the public from the use and operation of the railroad. The courts cannot absolve the defendants in error from this duty. The courts enforce contracts, but cannot nullify them * * * only by consent of the parties could the contract be nullified so as to relieve the defendants in error from their obligation to maintain and operate the road and not to move the track, * * * but this court cannot exercise such authority."

It is stated that the Legislature only had this power.

But regardless of this specific statute and should the trial court be held to have correctly limited its operation to "sold out" railroads, yet we submit that (a) the manner by which the St. Louis Southwestern Railroad Company came to own the stock of the Eastern Texas Railroad Company makes the statute under such construction applicable.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Minneapolis Civic and Commercial Association, 247 U. S., 490.

It is sheer sophistry to argue that because it is technically a separate legal entity, the Eastern (Texas Railroad) Company is an independent public carrier, free in the conduct of its business

from the control of the company which owns its capital stock furnishing its officers and electing directors; (b) and further, that Article 6676, requiring operation of trains from day to day, is undeniably applicable and impose the identical statutory obligation on the railroad company to maintain and operate its road during the term of its charter. How may it be said that the operation of trains enjoined by the statute can be accomplished without the contemporaneous maintenance of its track? The trial court does not deny that Article 6676 is applicable.

C. THE FEDERAL COURTS USUALLY FOLLOW THE STATE COURTS IN ARRIVING AT THE CONTRACT AND STATUTORY OBLIGATIONS EXISTING BETWEEN A STATE AND ITS CORPORATIONS.

In the case of Ricard vs. Metal Co., 246 U. S., 304, the Supreme Court agreed with the State courts; also done in I. & G. N. Ry. Co., 246 U. S., 431, 2nd paragraph; Railroad Co. vs. Kansas, 216 U. S., 262. The rule is stated in Burgess vs. Seligman, 107 U. S., 20, and Kuhn vs. Coal Co., 215 U. S., 349. The constitutionality of the statute is immaterial when the company accepts the charter. Street Railway Co. vs. Massachusetts, 207 U. S., 79.

We submit for the purpose of determining the legal right of the Eastern Texas Company to abandon operation of its railroad and to dismantle same, it must be considered that (a) the corporation is under contract obligation; (b) and statutory duty to continue operation and maintenance of its railroad during the term of its charter.

II.

The Fourteenth Amendment of the Constitution of the United States preventing an unconstitutional taking of property is not available to a railroad company seeking to escape a contract and statutory duty to continue operation and maintenance of its lines of railroad even at a loss.

A. RULE IN ABSENCE OF STATUTE OR CONTRACT.

Mr. Justice Holmes, in the Brooks Scanlan case, 251 U. S., 396, writing the opinion of the court and interpreting the Fourteenth Amendment, parenthetically stated, generally, a carrier cannot be compelled to operate at a loss, citing Northern Pacific Ry. vs. N. D., 236 U. S., 585; Norfolk vs. W. Va., 236 U. S., 235. He stated at the same time that charter obligations had to be fulfilled regardless of losses. Missouri Pacific vs. Kansas, 216 U. S., 262. In these cases undoubtedly the rule announced in Munn vs. Ill., 94 U. S., 113, that one having granted to the public an interest in one's property might withdraw it by discontinuing such use, was applied. Further, it must also be undoubtedly true that in these cases there was neither discovered nor tacitly understood either a contract duty or statutory obligation to the contrary; for subsequently, Mr. Justice Holmes, in the case of Bullock vs. Florida, 254 U. S., 519, speaking for the court, interposed a limitation upon the broad doctrine theretofore announced or else construed the extent to which such prior decisions could be considered as a pronouncement of the rule. In this latter case Mr. Justice Holmes more specifically stated the field notes and boundaries of the Fourteenth Amendment in such circumstances when he said, "Without previous statute or contract to compel the company to keep on at a loss would be a constitutional taking of its property."

Assuming that the foregoing is a correct interpretation of the principle resulting from the liquidation of the above decisions, we submit that the present case may not be disposed of on the authority of the Brooks Scanlan (251 U. S., 396) and Bullock cases (254 U. S., 519), for the perceptible reason that here we have the exact exception to the rule, namely, the restraining contract and statute.

B. RULE IN PRESENCE OF STATUTE AND CONTRACT.

1. Statute. Again the court, in the I. & G. N. case, 246 U. S., 424, was confronted with the probable effect of the Four-

teenth Amendment, which was relied upon as authority for relieving the railroad from the burden imposed requiring the location and maintenance of its offices and shops at Palestine. Mr. Justice Holmes stated that, "The acceptance of the charter by plaintiff in error disposed of every constitutional objection except one," viz., that the restriction imposed a burden upon interstate commerce.

The identical question was before the Supreme Court of Texas in the Enid, Ochiltree case, 191 S. W., 560, and that court also stated: "The railway company accepted the charter and submitted to the law and impliedly consented to obey it." The contention was considered without merit. The same rule—refusing to give force and effect to the Fourteenth Amendment where a railroad was operating a part of its business at a loss—was applied in the case of Railroad Co. vs. Massachusetts, 207 U. S., 81—there a State statute compelled the railroad company to transport school children at one-half fare. This statute was complained of because it impinged upon the Fourteenth Amendment—the offer of testimony was rejected. Mr. Justice Holmes, again speaking for the court, stated:

> "This court is of the opinion that the decision below is right. A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter and confines itself to this ground."

Same rule is announced in case of Railroad Co. vs. Kansas, 216 U. S., 262.

2. Contract. Of course the contract to maintain and operate its line of railroad is contained, if at all, in the charter of the company expressly written as a limitation therein or implied by reason of the existence of the statute of the State, one of the contracting parties. It is usually stated by the courts that "The Railroad Company and *its owners* must be held to have *so contracted* when the charter was issued and accepted"—Enid, Ochil-

tree case, supra. The rule is often announced where the corporation seeks to disencumber itself of its impediments that "The Railroad Company would have come into being and *have consented to come into being* subject to the liability *and could not be heard to complain.*"

Ashley vs. Ryan, 153 U. S., 436.

White vs. Davidson, 101 U. S., 371.

Water Co. vs. Newberry Port, 193 U. S., 561.

We therefore submit that the proposition above is correctly stated, viz., that the judicial tribunals are not open to a litigant nor is the Fourteenth Amendment a comfortable rendezvous wherein and whereby a corporation or its owners may relieve itself, or themselves, of voluntarily accepted privileges which subsequently transform themselves into financial burdens.

It might be, as correctly stated, that the rule likewise similarly applies to the litigant who seeks to enforce such obligations and contracts. And for that reason the order of the court denying the State judicial assistance in enforcing the Railroad Company to continue to operate and maintain its roads is correct, or further, that hardship of that character should not proceed from the hands of a court of equity or that the court, without finances of its own or sources from which to apply for financial aid, would be wholly unable to physically and financially enforce such an order compelling an insolvent corporation to operate and maintain a railroad, and for all these reasons that the judgment of the court below, in Equity No. 323, is correct.

Our complaint would be less vigorous against such an order and decree. Such action would be negative. No action. In which event the State, a contracting party whose contract has been breached, could and would accept the resulting remedy, namely, it would require of the party breaching its contract, the Railroad Company, to disgorge itself of at least some of its property and funds—found to be approximately $50,000 (Tr., 10) as damages, while otherwise, and by order of the trial court it is precipitously

retreating with its luggage intact. No one denies that the company can or may not respond in damages. The company with no discomfort disengages itself from its accepted burdens and contracts and is permitted to withdraw unmolested without liability for its breach, with property and funds almost, and if not entirely, adequate to discharge the damage resulting therefrom. It is an unique interpretation of the Fourteenth Amendment which would allow the Railroad Company to save its property, and at the same time take property from individuals who have used and are using the road. Can it be said that the patrons of the railroad whose property has been destroyed by the breach must not lay hands upon the Fourteenth Amendment for their protection? It at least cannot be other than a makeweight on both sides balancing itself.

Not only is this permitted by the decree of the court below, but the judgment is affirmative and aggressive. It arms the Railroad Company even in the presence of its obligation with authority to cease operation and to dismantle its road and thereafter to prevent any action for damage by the State or persons interested. We submit that the decree is contrary to the proposition announced above.

The trial court, in a studiously, careful and closely reasoned opinion, seeks to sustain its conclusion by saying, in effect, that the Railroad Company has been absolved from its obligation to maintain and operate its road. This absolution proceeds upon this theory—the legal estate in the road undiminished remains in the company for profit; its use only belongs to the public for a highway. The State breached its contract by failure to use the highway so as to bring profit to the company. The sufficient use abandoned therefore the obligation to maintain the highway has in some mystical way disappeared. The court cites Munn vs. Ill., 94 U. S., 113, as sustaining this reason. The proposition relied upon evidently is that where a person has devoted his property to the public use he may withdraw it when he sees fit.

This withdrawal accomplished in the language of the court "The contract terminates."

The reasoning proceeds on the correct principle in the absence of a contract or statutory obligation. It assumes the non-existence of the obligation and therefore no obligation. *Pro hoc ergo propter hoc.* The identical proposition, namely, that the railroad may cease to operate and maintain its road is the obligation in question. The conclusion is assumed, therefore the conclusion. The question is whether the Fourteenth Amendment permits the company to unshackle itself and not whether the State has already so permitted. No act of the Legislature has permitted it. No officer or agent of the State has authorized it. It is said the public has released the obligation by its acts—failure to use. This assumes some form of legislation heretofore unknown. The expressed will of the public is in its statutes demanding the continuance of the service. There is no guarantee by the State—the public—that profit will result to the company from the use of its property. The character of the obligation is stated without qualification that the road must be operated and to state it otherwise is to erase and hold for naught a binding obligation. To allow the cessation of operation and maintenance it must proceed not from consent, real or implied—the statute unrepealed—but by operation of the Fourteenth Amendment. When we come to this question we are confronted with the proposition that it is not available. We respectfully disagree with the court below in its attempt to give absolution to the Railroad Company for the reason that the principles applied are only applicable in the absence of a contract and statutory obligation.

CONCLUSION.

We earnestly submit that the decree of the trial court (1) in restraining the State of Texas and its Railroad Commission from compelling operation of the road or in the alternative to demand of the road damages for its breach of contract; (2) and in granting authority to the Eastern Texas Railroad Company to cease

operation and dismantle its road in intrastate commerce and sell its properties, was error, and the causes should be reversed.

Respectfully submitted,

W. A. KEELING,
Attorney General of Texas.
WALACE HAWKINS,
FRANK KEMP,
Assistant Attorneys General.
Solicitors for Appellant.
Address: Attorney General's Department.

INDEX

AUTHORITIES CITED

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 679 (In Equity No. 323)

THE STATE OF TEXAS,

Appellant,

vs.

EASTERN TEXAS RAILROAD COMPANY,

Appellee,

and

No. 680 (In Equity No. 325)

THE RAILROAD COMMISSION OF TEXAS, *et al.*,

Appellants,

vs.

EASTERN TEXAS RAILROAD COMPANY *et al.*,

Appellees.

Appeal from the District Court of the United States for the Western District of Texas.

BRIEF FOR APPELLEES

STATEMENT OF THE CASES

These causes, numbers 679 and 680 on the docket of this court, involve the same questions of fact and law, and for

the purpose of economizing time and labor in the consideration of the same by this court, counsel have agreed to file one brief applicable to both causes, and with the permission of the court, submit them together.

These cases involve the question of the attempt of the Eastern Texas Railroad Company to abandon the operation of its lines of railway. The same questions were presented to this court. However, in the former appeal the controversy was as to the effect of the Certificate of Public Convenience and Necessity granted to the Eastern Texas Railroad Company by the Interstate Commerce Commission. This court held in effect on the former appeal, that said certificate did not include or sanction the right of the discontinuance of operation or abandonment of its lines of railway by the Eastern Texas Railroad in the transportation of purely intrastate commerce. The cases there involved were reversed and remanded for further proceedings in accordance with the opinion.

After the mandate was filed in the Western District of Texas, the Eastern Texas Railroad Company amended its pleadings in the two causes now before the court, and in addition to the causes of action involved on the former appeal, plead more fully the rights of the railroad company to abandon the operation of its lines of railway under the provisions of the Fourteenth Amendment to the Constitution

of the United States, on the ground that it was being deprived of its property without due process of law.

On the pleadings as amended, the case was tried, and after a full hearing the District Judge presiding in said court, decided each of the cases in favor of the Railroad Company, and entered judgment accordingly.

The opinion of the District Judge filed in said cause was full and complete, both as to the facts and law; it is reported in the Federal Reporter Advance Sheets, Volume 283, page 584, published November 30, 1922. The statement of the case made in this opinion being satisfactory to counsel on both sides, it was adopted, under the provisions of equity rule 77, as an agreed record, constituting the record on appeal, and begins at the top of page 2 and ends on page 19 of each of transcripts in the causes now submitted. It is followed in each of said transcripts, at page 19, by a stipulation of counsel adopting the same as an agreed record. The judgment entered in each of said causes is to be found at page 20 in each of said transcripts.

In cause No. 679 the judgment entered in the trial court perpetually enjoined the Railroad Commission of Texas, and the members thereof, and the Attorney General of Texas, and the private parties defendants therein, from commencing any suit or proceeding against the Eastern Texas Railroad, for the recovery of damages, fines, or penalties, under the laws of Texas, or in otherwise interfering with said railway com-

pany in the abandonment of its line of railway, and the dismantling of the same (Tr. 21).

In cause No. 680, the trial court entered judgment dissolving the injunction issued theretofore, enjoining the railroad company, and its officers, from abandoning its railway and dismissed the bill filed by the state, and then at page 21 transcript, the third paragraph of the judgment entered a decree whereby the Eastern Texas Railroad Company recovered a judgment against the State of Texas on the cross action of the railway company, authorizing said company to abandon the operation of its lines of railway as to intrastate traffic and interstate traffic, both freight and passenger, and empowered it to take up and remove its tracks, dismantle its structures and dispose of the salvage to the best advantage, including the sale of its right-of-way, depot grounds, etc.

The other matters in the record are sufficiently embraced in the statement of the cases made by appellants in their brief filed herein, but some additional explanations may be made under the points and propositions hereinafter submitted:

APPELLANTS' SPECIFICATIONS OF ERROR

We reproduce the Specifications of Error made by appellants, as follows:

"SPECIFICATIONS OF ERROR RELIED UPON

1.

"The United States District Court for the Western District of Texas erred in giving judgment for defendants authorizing the cessation of operation of its railway and the dismantling of its road and refusing to enjoin said defendants from discontinuing operation and abandoning and dismantling said road.

2.

"The United State District Court for the Western District of Texas erred in its judgment and decree authorizing defendant, the Eastern Texas Railroad Company, to abandon its railway in intrastate and interstate commerce and to remove its ties, tracks, rails and dismantle all its properties and dispose of same.

3.

"The United States District Court for the Western District of Texas erred in its judgment and decree granting authority and permission to the defendant, the Eastern Texas Railroad Company, to abandon operation of its railroad and to dismantle same as a common carrier in intrastate commerce, contrary to its charter obligation and contract to construct, maintain and operate its line of railroad during the existence of its charter.

4.

"The United States District Court for the Western District of Texas erred in its judgment and decree granting authority and permission to defendant, the Eastern Texas Railroad Company, to abandon operation of its

railroad and to dismantle same as a common carrier in intrastate commerce, contrary to the statutes of the State of Texas requiring the maintenance and operation of said railroad during the existence of its charter."

Replying to the argument of appellants on the above and foregoing specifications of error, we submit the following

ARGUMENT

Under the foregoing assignments appellant contends that because the state statutes at the time appellee was chartered, prohibited it from abandoning the operation of its train and from taking up or removing its track, that the state can compel compliance with those statutes, although appellee would thereby be deprived of its property without due process of law and be denied the equal protection of the law, in violation of the Fourteenth Amendment.

In support of this contention appellant relies especially upon the following cases:

I. & G. N. Ry. vs. Anderson, 246 U.S. 432, 62 L.Ed. 814. This is a case in which this court is considering an effort on the part of the railway company to remove its general offices and machine shops from Palestine, where the location was fixed in accordance with the proviisons of a state statute.

The opinion in that case did not involve the provisions of the Fourteenth Amendment. The syllabus quoted at the top

of page 6 of appellant's brief is not a correct synopsis of the opinion.

In the opinion the court was first considering the rights acquired by the purchasers at the sale of the property under a mortgage foreclosure. After disposing of that question the court then proceeded to take up the main question, and at page 433, L. Ed. 816, said:

> "Apart from these considerations we should be slow to say that it was not within the power of a state legislature dealing with a corporation of the state to fix the place of its domicile and principal offices, in the absence of other facts than those appearing in this case. But furthermore, when the Office-Shops Act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. Interstate Consol. Street R. Co. vs. Mass., 207 U. S. 79, 52 L. Ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555. We agree with the state courts that the condition was imposed."

The above quotation in effect holds that a state statute fixing the location of general offices and shops was constitu-

tional; it also includes the statement, that other facts were absent—which we consider to mean facts showing a violation of the Fourteenth Amendment. Besides, the court declares that the "Office-Shops Act was far from a mere nullity." All these things being true, the language of the court does not warrant the syllabus contained in appellant's brief.

The case of Street Railway vs. Mass., 207 U. S. 79, referred to in above quotation, and relied upon by appellant, was one in which the statutes of Massachusetts required the railway to carry school children for a half rate. The Street Railway contended that this statute was unconstitutional because it violated the provisions of the Fourteenth Amendment, and offered to prove that it could not comply with the law without carrying passengers for less than a reasonable compensation, and for less than cost. The proof was rejected. On appeal this court, at page 84, L. Ed. 114, said:

> "The court is of opinion that the decision below was right. A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground."

The statute under consideration was one passed by the state in the exercise of its police power. The only attempt, so far as is disclosed by the record to show that the police power had been exceeded was an offer to prove that a con-

siderable percentage of the passengers carried by the company consisted of school children, and this percentage would be carried at a loss. There was no other proof offered to bring the case within the provisions of the Fourteenth Amendment. It is a case, therefore, involving a statutory writ applicable to only a portion of the traffic. The discussion of the case by the writer of the opinion shows that it was considered from the standpoint of a legislative rate fixed as a matter of public policy, in the interest of public education. It is indicated that in such a case the provisions of the Fourteenth Amendment should not be construed to apply. If we are correct in our view that this was the consideration which controlled the decision, then the quotation which we have made from the opinion of the court would be entirely justified; besides, it is a rate case, and clearly distinguishable from the case at bar.

The case of Horn Silver Mining Co. vs. State of New York, 143 U. S. page 306, 36 L. Ed. page 164 is cited by appellant. That was a tax case. The validity of the statute levying the tax was challenged, because the Mining Company's principal property was in Utah and Illinois, and the statute fixed the basis for taxes without regard to the amount of business done in New York, or the amount of capital employed in that state, and for some minor reasons. Under this proof it was contended that to require the payment of the taxes would violate the Fourteenth Amendment. The referee found the facts

as contended for by the Mining Company, but found that the company was liable for the taxes. Judgment was rendered accordingly.

On appeal this court held that the franchise was property and taxable in New York, and that the method of ascertaining the value of the franchise was within the legislative discretion. Then considering the rights of the Mining Company as a foreign corporation to do business in New York, held, in accordance with the established law, that New York could impose conditions upon such rights at the discretion of that state. The case is not authority for the contention made in the case at bar.

The case of Robbins vs. Shelby County, 120 U. S. 489, 30 L. Ed. page 694 was the case of a drummer from Ohio soliciting business in Shelby County, Tennessee. The statutes of the latter state levied a tax on such drummer and prescribed a penalty for its violation. Robbins was prosecuted for violating the statute. From a conviction he appealed to this court, where the question involved was the extent of the power of Congress to regulate interstate commerce. The court held that Robbins was a citizen of the United States and protected by the Constitution of the United States. The case has no bearing upon the case at bar, except to support our contention that state laws are subject to the provisions of the United States.

In reply to the contention of appellant, appellee submits the following counter propositions:

FIRST COUNTER PROPOSITION

The general laws of the state providing for the incorporation, maintenance and operation of railways, are a part of the charter contract between the railway company and the state, but such general laws are subordinate to the provisions of the Constitution, the Constitution of the United States, and amendments thereof.

We submit that any other construction of the charter contract would open a way and provide a means for evading the provisions of the Fourteenth Amendment, which are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment was in force and was a part of the paramount law of the land when the general laws of the State of Texas were passed authorizing the incorporation of railway companies; and also on March 29th, 1889, when the Texas Act became effective, which provided "Nor shall

the main track of any railroad once constructed be abandoned or removed." The force and effect of the General Laws providing for the incorporation of railways, and the provision denying the right to abandon or remove a main line track, were limited by the provisions of the Fourteenth Amendment. The amendment applies to "any law" made or enforced, or attempted to be enforced, by the State.

In the case of Chicago B. & Q. Ry. Co. vs. Chicago, 166 U. S. 228, 41 L. Ed. 979, this court, at page 223, L. Ed. 983, announced the law to be as follows:

> "But it must be observed that the prohibitions of the Amendments refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' Ex parte Virginia, 100 U. S. 339, 346, 347 (25, 676; 679); Neal vs. Delaware, 103 U. S. 370 (26; 567); Yick Wo vs. Hopkins, 118 U. S. 346 (30; 220); Gibson vs. Mississippi, 162 U. S. 579 (40; 1078). These principles were enforced in the recent case of Scott vs. McNeal, 154 U. S. 34 (38; 896), in which it was held that the prohibitions of the 14th Amendment extended to 'all acts of the state, whether through its legislative, its executive,

or its judicial authorities'; and consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th Amendment."

This announcement of the law by this court sustains our contention in our Counter Proposition. The state contends that the appellee is not protected by the Fourteenth Amendment as we contend, for the reason that appellee was chartered in 1900 and by accepting the state statutes, and thereby waived the protection of the Fourteenth Amendment. This cannot be true, for the reason that the announcement of the law by this court above quoted was made in 1897 and had been made long prior to that date in many other cases.

Appellee in accepting its charter, had a right to rely upon the law as thus announced—that is, appellee accepted the state statutes above referred to, limited by the provisions of the Fourteenth Amendment. Therefore, when appellee showed by the facts established in these cases that it would be deprived of its property without due process of law, and denied the equal protection of the laws by the action of the officers of the state in their attempts to enforce the provisions of the state laws referred to, then appellee was en-

titled to the judgment entered in the two cases by the trial court.

The case of Missouri Pacific Ry. vs. Nebraska, 164 U. S. 411, 41 L. Ed. 489, was one where the Nebraska Board of Transportation had made an order that a Railway Company should grant to complainants therein, on like terms and conditions as granted to the owners of two existing elevators, part of its depot ground for the erection of elevators. The order of the Board of Transportation was sustained by the Supreme Court of Nebraska. This court after reviewing the case, at page 417, L. Ed. 495, announced the law to be that

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Amendment of the Constitution of the United States,"

and cited a number of decisions in support of this proposition. In that case it was admitted that the statutes of Nebraska prohibited unjust discrimination. It was also admitted that the Supreme Court of the State had held that the action of the Railway Company was an unjust discrimination. The only question involved was the right of the State to compel a transfer of a part of the property of the Railway Company to private individuals. The same rule as therein announced would apply to a case of the State attempting to compel a railway

company to transfer a part of its property to public use, or to permit it to remain in a position where it would decay or rot, unless the state made provision for reasonable compensation to the Railway Company.

In the Chicago case, supra, this court, at page 236, 41 L. Ed. page 984, said:

> "The requirement that the property shall not be taken for public use without just compensation is but an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

STATEMENT

The facts so far as material to the question now being considered, as shown page 5 ptd. Tr., are that the value of the property of appellee in 1919 was fixed by the Railroad Commission of Texas at $458,046.64, and that appellee has no bonded or other indebtedness. It appears that the railroad was constructed to serve a large saw mill at Ratcliff, and during the operation of the mill the railroad could be successfully operated, by reason of the tonnage received from the mill. The mill at Ratcliff ceased operation in 1917. The road ceased operation April 30, 1921. (Ptd. Tr. cause 679, page 5.) At this time the loss from operation had been $53,-

972.01. The loss under government control was for 26 months $85,544.98, making a total loss up to April 30, 1921 of $140,516.99. Appellee has no cash or credit; its only asset is what its property may bring at sale or as salvage; that was estimated to be, at the time of the trial, $50,000.00, less the cost of dismantling. The property had been widely advertised, and offered for sale at that figure prior to the trial, and no bids were received (Tr. p. 5). Heavy expenditures on rails and trestles will be necessary for safe operation. This was estimated by engineers at $250,000.00. The State Railroad Commission estimated it at $120,000.00. The Interstate Commerce engineer in 1920 estimated it at $146,726.00. The trial court found that on May 1st, 1921, when operation ceased, that a conservative fair estimate of the amount required to put the road in safe operating condition would be $165,000.00, with an added expenditure of $20,000.00 before June 1st, 1922, making a total of $185,000.00 to that date. These facts are a part of the agreed record. The result of the operation of the road for the various years is set forth under that head at page 6 ptd. Tr. cause 679. The estimated cost of future operation would be $100,713.55 (ptd. Tr. 6 and 7), and the court finds a probable annual deficit of $64,000.00 (Tr. 7).

In other words, the entire assets of appellee would be absorbed by operating the property in less than one year, if operation were possible. The trial court found from all the

facts, and it is a part of the agreed record, that "these figures force the inevitable conclusion that the railway company has reached the ultimate limit of any possible future activity, either physical or financial; it lies inert, practically bankrupt (Ptd. Tr. 8). After finding the facts as indicated, the trial court proceeded to deliver its opinion, wherein the legal questions were carefully considered (Tr. 9-19 cause 679), and concluded as follows:

> "From the foregoing it results that the State of Texas in the suit numbered 323 should take nothing; and that the injunction issued by the state court should be dissolved; and further, that the defendant, the Railroad, should be authorized to abandon its railway as to intrastate as well as interstate traffic; and also to remove its ties, rails and track, and dismantle all of its structures and property, and to dispose of them by sale or otherwise as it may be advised. It also results that the Eastern Texas Railroad Company, plaintiff in number 325, is entitled to have the temporary restraining order, heretofore issued in this case, against all of the defendants, made perpetual. Final orders and decrees carrying into effect the conclusions of the court, as herein expressed will be entered in due course."

SECOND COUNTER PROPOSITION

The substance of appellant's contention herein is that the State can compel appellee to permit the unused track of its railway to remain permanently

where once constructed; and also that the State can compel appellee to perform train service without adequate compensation, although appellee has neither cash nor credit, and that neither of these acts of the State would violate the Fourteenth Amendment, because of the form used by the State in compelling such action.

In construing the statutes and the state action with reference to the violation of constitutional provisions, it is one of the rules established by this court that it will look to the substance without regard to the form.

The appellants contend in this case because the statutes relied upon for taking appellee's property without due process of law were in force at the time appellee was chartered, that the provisions of the Fourteenth Amendment do not apply. This contention cannot be sustained without regarding the form and method as superior to the substance.

THIRD COUNTER PROPOSITION

Article 6625 of the Revised Civil Statutes of Texas applies only to railroads that have been sold for debt, and was intended to provide for the organization of new companies to maintain and operate such sold out railroads and serve the communities through which they extend. The provision of the Statute "nor shall the main track of any rail-

road once constructed and operated be abandoned or removed" applies only to railroads which have been sold for debt, the subject with which the entire statute deals. It does not prohibit the abandonment or removal of the tracks of a railroad which has not been sold for debt but which cannot be operated and which is of no value for railroad and transportation purposes because the communities through which it extends cannot and do not furnish sufficient business to pay it a revenue sufficient to defray its operating expenses and make it a going concern.

ARGUMENT

Article 6625 was enacted by the Twenty-First Legislature, and will be found in Chapter 24 of the Acts thereof. It is set out in full in the transcript in this cause, on pages 12 and 13. It is evident from the caption, the Act itself, and the emergency clause, that the purpose of the Legislature was to provide a means whereby the purchasers of railroads sold for debt might form corporations to take over, maintain and operate such properties. The caption of the Act shows clearly that the Act merely fixes the rights of purchasers of railroads sold for debt, and it appears from the emergency clause that such was the purpose, there being prior thereto no law sufficiently providing for the organization of corporations "for the purpose of acquiring, owning and extending such sold out

properties." The Act is found in Revised Civil Statutes of Texas in Chapter 11 of Title 115 thereof, and the heading of this chapter is "COLLECTION OF DEBTS FROM RAILROAD CORPORATIONS." The very sentence of which the clause above quoted and relied upon by the State is a part, shows upon its face that it is confined to the subject "sold-out railroads." It would be a very strange and unusual construction indeed to take this incidental clause, isolate it from the remainder of the statute, and apply it to the subject matter to which, it is conceded, the Statute as a whole could not be applied. No such construction is warranted by the context, but, on the contrary, the natural construction would be to confine the application of this clause to the general subject of the Act, to-wit, the rights of the purchasers of railroads sold for debt.

Section 30 of Article 3 of the Constitution of Texas is as follows:

> "No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose."

Section 35 of the same Article is as follows:

> "No bill (except general appropriation bills which may embrace the various subjects and accounts for and on account of which moneys are appropriated) shall contain more than one subject which shall be embraced in its title, but if any subject shall be embraced in an Act which shall not be embraced in the title, such act shall

be void only as to so much thereof as shall not be so expressed."

The subject of this Act is the formation of new corporations to take over, maintain and operate railroads sold for debt. This is the only subject with which it purports to deal. If the clause relied upon by the State should be construed to have a wider application and to prohibit the abandonment and removal of the track of any and all railroads once constructed and operated within the State, then such Act would cover two separate subjects; first, the formation of corporations to take over, maintain and operate railroads sold for debt; and, second, the abandonment and removal of railroads once constructed and operated; the second subject being not expressed in the title. This would be a clear violation of Section 35 of Article 3 of the Constitution, and as a result, the clause at least would be rendered void. It would violate also Section 30 of said Article 3 in that the effect of this clause would be a departure from the original purpose of the bill, which was evidently to provide for the operation, etc., of sold-out roads.

On the other hand, if the clause "nor shall the main track of any railroad once constructed and operated be abandoned or removed" be construed to relate only to railroads sold for debt, then it is fairly included within the subject of rights of purchasers of such railroads to form corporations for the

purpose of taking over, maintaining and operating the railroad properties, and is a mere limitation incident to the rights conferred by the Statute. By such construction, the Act would have only one subject within the meaning of the Constitution, and would provide for the organization, by purchasers of railroads sold for debt, of corporations to take over and operate the same, limited by a provision, among others, that such sold-out railroads should not be abandoned or removed. Thus, such act would conform to Section 35 of Article 3 of the State Constitution. By this construction, it would conform also to Section 30 of Article 3 of said Constitution, as it would adhere to the single purpose of providing for the operation of railroads sold for debt, and would not wander into the wider domain of legislating in regard to the abandonment and removal of railroad tracks under any and all circumstances—a matter altogether foreign to such original purpose. We see thus that if there be anything in the theory advanced by the State, the Statute is susceptible of two constructions; by the one of which it would be constitutional, and by the other, unconstitutional. When such a case presents itself, the court will, if possible, construe the Statute in such a way as to render all its provisions constitutional. In this case, that very logically can and should be done by confining the operation of the Statute to its original purpose.

The railroad of appellee is not a sold-out railroad and has never been sold for debt. This is simply a case where

the railroad cannot be operated because the revenue it receives from the business afforded by the communities through which it extends is not sufficient to defray the expenses of operation (Statement of Facts, Tr. pp. 4, 5, 6, 7 and 8). The Statute, in the light of the Constitution, could not cover such a case, nor when its wording is considered does it purport to do so.

FOURTH COUNTER PROPOSITION

It was not the purpose of Article 6625 of the Revised Civil Statutes of Texas to prohibit the abandonment and removal of railroads which have not been sold for debt, but which cannot be operated because the communities through which they extend do not and cannot afford sufficient business to sustain them or defray their operating expenses and which are, therefore, of no value as means of transportation, either to their owners or to the communities through which they extend.

ARGUMENT

The statement of facts found by the Court below (Tr. pp. 4, 5, 6, 7, and 8) shows clearly the matters set out and referred to herein.

The Eastern Texas Railroad Company was organized in 1900, and owns the tracks and properties involved in this proceeding, and has owned the same since their construction.

The road is not a sold-out railroad, has never been sold for debt and in fact owes no debts for which it could be sold. The Company operated the railroad and carried on a railroad business until April 30, 1921, when it ceased operation, and has not been operated since that date. The road was formerly sustained by shipments of lumber cut by a mill located on the line of the road. The timber supply was exhausted in 1917, and the territory which the road traversed has no other resources or business capable of sustaining it. Since that time, the operation of the road has involved, continuously, tremendous losses, the details of which have heretofore been set out. There are no reasons on which to base a belief or "hope" that conditions in the territory adjacent to the road will substantially improve in the future.

The record in this cause and in the cases of State of Texas vs. Eastern Texas Railroad Company et al., and State of Texas et al. vs. United States et al. (Advance Opinions, U. S. Supreme Court, 1921-22, No. 11, date April 15, 1922, pp. 312-17), shows that there was no prospect of the public being able to furnish sufficient traffic to provide a revenue for the payment of the expenses of operation of the road. The opinion in the two cases appealed by the State of Texas referred to above, gives the history of the litigation therein involved. Upon the facts therein stated, this Court held that the Interstate Commerce Commission was justified in

issuing a Certificate of Public Convenience and Necessity authorizing the abandonment of the line of railway of the Eastern Texas Railroad, so far as the same was used in interstate commerce, but did not authorize the abandonment of such use as respects intrastate commerce, and reversed the cases for further proceedings, in accordance with the opinion. In doing so, this court, among other things, said:

> "Whether, apart from the Commission's certificate, the railroad company is entitled to abandon its intrastate business, is not before us, so we have no occasion for considering to what extent the decisions in Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S. 396, 64 L. Ed. 323, P. U. R. 1920C, 579, 40 Sup. Ct. Rep. 183, and Bullock vs. Railroad Commissions, 254 U. S. 513, 65 L. Ed. 380, P. U. R. 1921B, 507, 41 Sup. Ct. Rev. 193, may be applicable to this road."

In accordance with the instructions of this court, the proceedings presented in this record were had in causes now at bar.

The Brooks-Scanlon case above referred to is directly in point. The Brooks-Scanlon Lumber Company, a Louisiana corporation, owned timber lands, saw mills and a narrow gauge railroad; the Lumber Company organized the railroad company known as the "Kentwood & Eastern Railroad Company," and transferred to the railroad company the lines of railway. The Supreme Court of Louisiana held that the

Lumber Company and the Railroad Company were one company operating under different names, and that, although the Railroad Company showed a loss, its operation could be compelled because the entire business of the two companies was operated at a profit.

Commenting on this decision, this court (251 U. S. p. 399 64 L. Ed. 326) said:

> "We are of opinion that the test applied was wrong under the decisions of this court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to Northern P. R. Co. vs. North Dakota, 236 U. S. 585, 595, 599, 600, 604, 59 L. Ed. 735, 741, 743-745, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, and Norfolk & W. R. Co. vs. West Verginia, 236 U. S. 605, 609, 614, 59 L. Ed. 745, 747, 749, P. U. R. 1915C, 293, 35 Sup. Ct. Rep. 437. It is true that if a railroad continues to exercise the power conferred upon it by a charter from a state, the state may require it to fulfill an obligation imposed by the charter, even though fulfillment in that particular may cause a loss. Missouri P. R. Co. vs. Kansas, 216 U. S. 262, 276, 278, 54 L. Ed. 472, 478, 479, 30 Sup. Ct. Rep. 330. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a

railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. Munn vs. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77, 84."

The case of Bullock vs. State of Florida, 254 U. S. 513; 65 L. Ed. 380, is likewise in point. In the beginning of the opinion, this court said:

"This is a proceeding by the relators, seeking a prohibition forbidding a state judge of a lower court to confirm a sale of a railroad 'for the purpose of and with the privilege on the part of the purchaser of dismantling the same'."

In the discussion of the case, this court, at pages 520-1, L. Ed. p. 383, said:

"Apart from the statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S. 396, 64 L. Ed. 323, P. U. R. 1920C, 579, 40 Sup. Ct. Rep. 183. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the state, and have been allowed to exercise the power of eminent domain."

In the case at bar, we have shown, and the trial court showed in his opinion, that the Statute relied upon as pro-

hibiting the removal of a main line track of a railroad was not applicable to this Company. We have also shown that although applicable, this Company would still be protected under the Fourteenth Amendment.

On the question of limiting the Statute to a sold-out road, we call attention to the fact that it is a Statute derogatory to common law rights. As such, it should not be applied to any case that does not come strictly within its terms, but should be confined to the subject matter with which the Legislature was dealing. The Legislature was dealing with a sold-out road and the formation of a corporation to purchase and operate the sold-out road.

The Act of the Legislature assumes that the property sold had value as a transportation system. It assumes that the communities traversed by the line would furnish sufficient traffic to sustain it or else the purchasers would not invest their money. Under this state of facts, the Legislature attempted to protect such communities by prohibiting the abandonment and removal of a part of the main track. It is apparent that the Legislature had in view certain railroad properties. It is a matter of history that one large railroad property was discussed elaborately in the enactment of the law.

The Eastern Texas Railroad Company has no value as a transportation facility. It cannot be operated by any one except at a ruinous loss. It has ceased operation; its property

is going to waste. We again insist, therefore, that the trial court reached a correct conclusion.

The opinion of the trial judge (283 Federal Reporter 584), which constitutes the agreed record in this cause, clearly and succinctly states the case and follows the case to a logical conclusion in the law, and, we think, entirely warrants an affirmance of both cases.

Counsel have prepared and submitted this brief, however, in the hope that they might be of assistance in presenting to this court a complete statement and picture of the situation as it really exists. With the hope that we have accomplished this purpose, we submit the case upon the record and this brief.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,
W. B. HAMILTON,
Attorneys for Appellees.